86-931

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IRVING MACHLEDER,

Petitioner,

v.

CBS INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW*

1. Did the Court of Appeals violate the private figure petitioner's Seventh and Fourteenth Amendment rights in dismissing petitioner's complaint and vacating the judgment in his favor entered on the jury's verdict that the media respondent had falsely portrayed him in a televised ambush interview relating to the illegal dumping of chemical wastes, and in failing to reconcile a "seeming inconsistency" in the jury's answers to interrogatories on two separate torts, libel and false light invasion of privacy, where (a) the Court acknowledged that the two torts are different, (b) the finding of liability on the libel claim was not a predicate to the finding of liability on the false light invasion of privacy claim, (c) the gravamen of the false light claim was broader than that of the libel claim, and (d) the Court did not cite any evidence in the record to support its conclusion that the jury had to have found not substantially false respondent's portrayal of petitioner as having been involved in the illegal dumping of chemical wastes, there being no evidence in the record to support such conclusion and portrayal, and there being abundant evidence in the record to the contrary?

2. Did the Court of Appeals err in holding in this false light invasion of privacy suit that any portrayal of an individual captured by a camera cannot be false as a matter of law?

3. Did the Court of Appeals deprive the petitioner of his Seventh and Fourteenth Amendment rights in holding that the District Court erred in permitting to go to the jury the issue of what is highly offensive to a person of ordinary sensibilities where the petitioner claimed that respondent's false portrayal of him as having been involved in the illegal dumping of chemical wastes and as being intemperate and evasive was highly offensive, and where the jury found for petitioner on that issue?

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* Pursuant to Rule 21.1(b), petitioner states that the following parties appeared in the Court of Appeals for the Second Circuit:

Irving Machleder
Flexcraft Industries, Inc.: a corporation with no subsidiaries or affiliates.
CBS Inc.
Arnold Diaz
Thomas Gallagher
Frank Pivalo
Dennis P. Coyne

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Petitioner, Irving Machleder, respectfully prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this false light invasion of privacy action on September 10, 1986.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 801 F.2d 46. It is reprinted as Appendix A to this petition at A-3-32.

Two opinions by the United States District Court for the Southern District of New York issued in this proceeding. Respondent's motion for judgment notwithstanding the verdict or, in the alternative for new trial was denied; the motion was decided on October 4, 1985, and the decision is reported at 618 F.Supp. 1367. It appears as Appendix B to this petition at B-1-19.

Respondent's motion for summary judgment was granted in part and denied in part and petitioner's cross-motion for summary judgment was denied; the motions were decided on April 17, 1982, and the decision is reported at 538 F.Supp. 1364. It is reprinted as Appendix C to this petition at C-1-20.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 10, 1986. This petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. FIRST AMENDMENT, UNITED STATES CONSTITUTION: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. SEVENTH AMENDMENT, UNITED STATES CONSTITUTION: "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

3. FOURTEENTH AMENDMENT, SECTION 1, UNITED STATES CONSTITUTION: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Irving Machleder, the founder and owner of a small business which manufactures and sells glues and adhesives used for industrial purposes, sued CBS and members of its news staff for its portrayal of him in a news report which was filmed on May 22, 1979 and aired that evening on the 6 o'clock news. The victim of an ambush interview,[1] in a piece concerning the

[1] "Ambush interview" is a term used in broadcast journalism to describe a situation in which a television news crew confronts an unsuspecting subject on the street who is unwilling to submit to a televised interview and bombards him with incriminating accusations ostensibly framed as questions. For a discussion of this technique and its legal implications, *see*, Note, *The Ambush Interview:*

(footnote continued on next page)

illegal dumping of chemical wastes in Newark, New Jersey, petitioner was the dramatic centerpiece of the broadcast which he claimed conveyed the impression that he had dumped hazardous chemicals or had otherwise been involved in the dumping, that he was being evasive as to his participation in and knowledge of the dumping, and that he was an intemperate and hostile person. He sued for invasion of privacy and libel.[2]

A federal court jury awarded petitioner $250,000 in compensatory damages and $1 million in punitive damages upon their finding that the broadcast was a false light portrayal of petitioner and that there was clear and convincing evidence that respondent had acted with actual malice in creating and airing the piece.

The District Court sustained the jury verdict and the amount of the award. The Second Circuit reversed and dismissed the complaint.

The Broadcast

The videotape of the broadcast and the outtakes[3] (which were viewed by the District Court and by the jury) and the circumstances of the filming and the aftermath of the broadcast are to some extent described in the District Court's summary judgment decision (App. C at 2-6). While a transcript of the report is published in the decision, the Court took care to note that a reading of the transcript cannot substitute for the visual and aural impact of the tape.[4] App. C at 6.

(footnote continued from preceding page)

A False Light Invasion of Privacy?, 34 Case W. Res. L. Rev. 72 (1983).

[2] Other claims asserted on his own behalf and on behalf of his company, Flexcraft Industries, Inc., for assault, trespass and slander, were dismissed at various stages of the litigation and are not here in issue.

[3] The term "outtakes" refers to the portions of the film shot by the reporter and his camera crew which were edited out of the broadcast.

[4] The tape of the broadcast and outtakes was part of the record below (Pl. Exh. 1 and Dft. Exh. M).

At the time of the incident two years had passed since petitioner had discovered chemical drums dumped on property in the vicinity of his small business. Upon discovering the dump site he immediately reported it to local, state and federal authorities and cooperated with them in their investigation. The New Jersey Environmental Protection Agency rated the site as low priority for remedial action because of the absence of any appreciable danger.

In 1979, respondent's local station, WCBS-TV, in the course of a series of reports on the hazards of toxic chemical storage and disposal in New Jersey, sent its reporter, Arnold Diaz, with a camera crew to the site.

The ambush interview occurred when Diaz saw petitioner leave his office to keep a business appointment. Without introducing himself or stating his purpose, and taking petitioner totally by surprise, Diaz began to question petitioner in an accusatory manner. Petitioner asked several times that any discussion proceed off camera, but Diaz ignored him, and with the camera rolling pressed his attack. Although the camera captured a portion of petitioner's request—he is seen in a composed state and heard to say "I don't want to be on television, I'm sorry, I'm sorry,"—that portion of the interview was edited out of the broadcast. His request unheeded, the reporter prodding him with loaded questions—"Why are the barrels dumped in the back?"—and the three-man camera crew hemming him in, petitioner, who was then 71 years of age, became disoriented, and with his face flushed with emotion, his arms waving to ward off his interrogator and the camera, he shouted angrily "Get that damn camera out of here." The portion of the ambush interview which aired that evening began with that outburst and continued as the reporter persisted with his loaded questions and petitioner sought to retreat to his office for refuge.

Litigation History

On August 21, 1979, Machleder filed suit in the United States District Court for the Southern District of New York. He asserted that the televised report had defamed him and had violated his privacy by portraying him in a false light, by intruding upon his seclusion, and by giving improper publicity

to his private life. He further asserted that the report had been prepared and broadcast with actual malice.

After discovery was completed, respondent filed a motion for summary judgment. The District Court (Duffy, J.) rendered its decision on April 17, 1982 holding that the broadcast was susceptible of a defamatory meaning and a false light portrayal of the petitioner. The Court further held that the record supported petitioner's contention that a jury might reasonably find that the false light portrayal and defamatory connotation had been intended by the respondent.[5]

In finding that the telecast "could lead a reasonable person to conclude that plaintiffs dumped the chemicals," Judge Duffy underscored three parts of the telecast which could support that conclusion: "the portrayal of plaintiff Machleder's anger as a defensive and guilty response to Diaz's questions about the dumping rather than an angry response to being confronted with television cameras;" the implication that the dumping occurred on petitioner's land; and the fire chief's statement that the contents of the barrels consisted of by-products of paint and lacquer (products which were manufactured by petitioner's business). App. C at 9-10.

Further, Judge Duffy noted that "[e]vidence in the record exists to show that this implication may not have been far from defendants' minds when they edited the program for presentation," and specified the portions of the record which supported petitioner's contention that the respondent had acted with actual malice.[6]

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[5] The Court dismissed petitioner's trespass claim and, treating petitioner's invasion of privacy claim as three separate claims—(i) intrusion upon seclusion, (ii) improper publicity to private facts, and (iii) false light invasion of privacy—dismissed the first two. *See* App. C. The Court of Appeals, on petitioner's cross-appeal, affirmed so much of the decision as dismissed the trespass and improper publicity claims. *See* App. A.

[6] "Stephen J. Cohen, the News Director of WCBS-TV, described in part the decision to show Machleder's agitated response to Diaz' questions in the program as follows:

'I have come to believe that a bare denial of complicity in a situation like this by someone close enough to it geographically or

(footnote continued on next page)

Finally, Judge Duffy ruled that the record permitted a jury to find that (a) petitioner's behavior as depicted in the broadcast resulted not from his being intemperate or evasive but from respondent's provocations—the manner in which the interrogation was conducted and the presence of cameras—and (b) respondent had falsely and deliberately depicted petitioner as "intemperate and even guilty of dumping." App. C at 17. This portrayal, Judge Duffy held, "cannot be deemed inoffensive as a matter of law" and a jury may find respondent liable for false light invasion of privacy. App. C at 17.

No appeal was taken by respondent at that time from the District Court's denial of summary judgment on the defamation and false light invasion of privacy claims. Three years after the decision was rendered, in May 1985, the case was reached for trial. The jury trial, presided over by District Judge Peter K. Leisure, lasted four weeks; at respondent's request it was bifurcated as to liability and damages.

The jury found CBS liable on petitioner's false light claim. Specifically, it found in its special verdict that Machleder had proved by clear and convincing evidence that (i) he had been portrayed in a false light by the broadcast, (ii) the false light portrayal would be highly offensive to persons of ordinary

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(footnote continued from preceding page)

> situationally to logically have had the opportunity to have information about it, is simply not a sufficient response to reporter's questions.'
>
> (Cohen Affidavit ¶ 19)
>
> Thus, Cohen may have shown Machleder's angry response in order to create the very impression which plaintiffs argue is defamatory, to wit, that because the president of the company whose land is situated next to a chemical dump site does not wish to answer the reporter's questions and becomes agitated when asked these apparently accusatory questions, he must be in some way responsible for the presence of the chemical wastes. The video tape of the news program could be interpreted to show Machleder as evasive, guilty, and the anonymous dumping culprit. The fact that the defendants excised from their broadcast statements by Chief McLaughlin that the situation presented no hazard and that the dumping did not originate locally indicate that the defendants may have deliberately created this false impression of the plaintiff Machleder. * * *"
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> App. C at 12-13.

sensibilities, and (iii) respondent had acted with actual malice (as defined by this Court in First Amendment cases). On each and every element of the tort, applying the highest standards of proof and fault, it found for petitioner.

On the defamation claim, the jury found respondent not liable. It answered all of the questions on the verdict sheet in favor of petitioner, save one:

> Do you find that plaintiff Irving Machleder has proved by a preponderance of the evidence that any defamatory statements of fact concerning him in the May 22, 1979 broadcast were substantially false? No.

App. A at 26 n.1.

This finding is the fulcrum on which the Court of Appeals' decision turns.

Significantly, and as argued to the Court of Appeals, petitioner had objected at trial to the use in the jury charge and in the verdict sheet of the formulation "defamatory statements of fact." Trial Record at 1622-1627. Petitioner contended that such formulation was erroneous and misleading in the context of a telecast; that "statement(s)" suggests the need to find actual words which are false and defamatory rather than to find false and defamatory meaning in the message fashioned by all of the elements of the broadcast taken together such as physical gestures, facial expressions, voice inflections, juxtaposition of words and pictures, and all of the other multi-sensory elements which give television its unique and potent impact. The basis for petitioner's objection was apparently validated by the jury's request during its deliberations to review a transcript of the broadcast, although no transcript had been introduced in evidence (and, consequently, the request was denied). Trial Record at 1838-1844. Thus, while CBS argued to the trial court and to the Court of Appeals that the false light claim could not stand because it was inconsistent with the jury finding on the defamation claim, petitioner argued to both Courts that all of the findings on the false light claim were internally consistent, that the findings necessary to sustain the two torts were different, that the jury correctly applied the law as charged, and that if a comparison of the

jury's findings on the two separate torts appeared to be inconsistent it was because the jury had been misled by the focus of the libel charge on the literal truth or falsity of the *words* in the broadcast. Arguing that the applicable standard of review required the District Court to reconcile the inconsistency in its favor as the verdict winner, petitioner also maintained, alternatively, that it was entitled to have the libel claim remanded.[7]

The trial judge sustained the jury verdicts on liability and damages, denying respondent's motion for judgment n.o.v., or in the alternative for a new trial. An appeal to the Court of Appeals ensued. The Court of Appeals reversed and dismissed outright petitioner's complaint.

The Appellate Court's reversal is underpinned by three conclusions which are stated in the Opinion written for the Court by Judge Cardamone.

The Circuit Court's Conclusions

First, said Judge Cardamone, "Because the jury found in plaintiff's libel action that the defamatory statements, i.e., of illegal dumping, were not substantially false, the illegal dumping portrayal will not support a false light verdict." Second, he continued, "[a]s a matter of law, we conclude that the portrayal of Irving Machleder as intemperate and evasive is not false"; and third, that as a matter of law such portrayal "is not highly offensive to a reasonable person." App. A at 32. Thus, Judge Cardamone disposed of each of the essential ingredients of the tort, reversing each of the jury findings for petitioner and rejecting the conclusions of Judges Duffy and Leisure.

As we will show, the Appellate Court's conclusions are unfounded; further, they advance legal propositions affecting important rights of private citizens which conflict with established precedents and which are presented without analysis or rationale; finally, they evince a scope and process of appellate review which exceed the limits established by this Court and

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[7] No appeal was taken from the judgment dismissing the libel claim since no additional damages to those awarded on the false light claim could be awarded petitioner to compensate him for injury to his reputation.

fall short of the requirements imposed by the Seventh and Fourteenth Amendments.

Analysis of the Decision Below

Beginning with a discussion of the elements of the tort of false light invasion of privacy and the relationship of that tort to defamation, the Court hewed closely to established precedents and to the Restatement (Second) of Torts, § 652 E. The Court established that truth is a defense to a false light claim (not only must the portrayal be false, but it must be highly offensive to a reasonable person) and that false light and defamation are distinct torts. These propositions having been noted—propositions with which petitioner is in agreement—the Court purported to examine this case in their light and announced at the outset that "as will be shown, there was no evidence on which a reasonable jury could find that the broadcast portrayed the plaintiff in a false light." App. A at 20.

If the Court did in fact search the record to find evidentiary support for the verdict as it was required to do under the applicable standard of appellate review, it is not apparent from the Opinion. The Court's promise of an evidentiary review was left unfulfilled. Instead, detecting a "seeming inconsistency" in the verdict between the defamation findings and the invasion of privacy findings, the Court purported to attempt a reconciliation, but failed. In its attempt, the Court ignored the evidence adduced in petitioner's favor and all favorable inferences drawn therefrom by the jury, and negated the verdict.

The False Portrayal

On the false light claim petitioner contended that the broadcast had falsely portrayed him as intemperate, evasive and as having been involved in the illegal dumping of chemical wastes. The jury had been charged that petitioner could not recover "if . . . the broadcast portrayed only what was substantially accurate," and that falsity was an essential element of the tort. Trial Record at 1812. The jury found such falsity.

Troublesome to the Appellate Court was the finding on the independent libel claim that petitioner had not shown that "defamatory statements of fact concerning him in the . . . broadcast were substantially false." App. A at 26 n.1.

By a leap of logic, the Court arrived at its first conclusion and the underlying premise of its Opinion. "There is," said Judge Cardamone, "one theory for reconciling the jury's verdict as to the false light claim and the libel claim," that is, "the jury could have found[8] that the plaintiff was an illegal dumper, but was not, as portrayed, intemperate and evasive." App. A at 27. In other words, the jury that awarded $1.25 million in damages did so after finding that petitioner was a chemical dumper and had accurately been portrayed as such; and although this environmental polluter had been exposed in a substantially accurate portrayal, he was neither an intemperate nor evasive person by nature and the portrayal of him as such was false and sufficient to warrant a substantial award of compensatory damages as well as the imposition of punitive damages against the broadcaster. Simply to state the proposition is to expose its implausibility.[9]

In labeling the petitioner a dumper, Judge Cardamone resorted to groundless supposition as to what the jury had done. He ruled out every possibility except the one least logical. *Sub silentio*, he ruled out the possibility that the jury had been confused by the complicated defamation charge. He ruled out the possibility that the jury had conducted a vain search for an explicit sentence or word in the broadcast accusing petitioner of complicity in the dumping (and thus declined to find libel), but had been amply convinced that the clear message of the report in its entirety was just such a deliberate accusation (and thus found false light invasion). He ruled out

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[8] This should read "must have found," since the Second Circuit admitted to no other possibility and rested its decision on this conclusion.

[9] The trial judge, who in a stongly worded opinion sustained the verdict (and in so doing called upon his own observations of the testimony, the demeanor and credibility of witnesses, and his "feel" of the case), did not accept this theory of reconciliation—that the jury had found that a chemical polluter should be rewarded. App. B at 6-7.

the possibility that the jury did not find the broadcast to have accused petitioner of having dumped the chemicals himself (the gravamen of petitioner's libel claim) but did find it to have accused him of complicity in the illegal activity and of trying to conceal his role and his knowledge of the event.

Further, Judge Cardamone totally ignored the evidence in the record regarding the truth or falsity of the portrayal of petitioner as a participant in the dumping. He did not cite any evidence which would support the portrayal of petitioner as a dumper as, indeed, there was none in the record. Totally ignored was the overwhelming evidence that petitioner had nothing to do with the dumping. Thus, the record showed that on a Monday morning upon arriving at work petitioner discovered the dump site on property two lots removed from his own. Trial Record at 1104. It was he who promptly reported the condition to the authorities. Trial Record at 1105, 1107-1109. A Coast Guard officer testified at trial that petitioner had "acted as a good citizen." Trial Record at 984. The record showed that petitioner's own use of chemicals was in a blending operation which produced neither wastes nor by-products and that all chemicals purchased by petitioner were used completely. Trial Record at 1088. The outtakes revealed that the fire chief interviewed by reporter Diaz had stated on camera that the dumping had not originated locally.[10]

Respondent had not introduced any evidence that petitioner was the dumper or that he was an accessory. Nor, indeed, had respondent argued at trial that he was. In short, the only way the jury could have reached the conclusion advanced by Judge Cardamone—that petitioner was the dumper—was to have disbelieved petitioner's testimony and to have rejected all of the other affirmative evidence that petitioner had no complicity in the act, for there was absolutely no evidence to the contrary or evidence sufficient even to raise any doubt as to his role.

Although the Appellate Court's duty was to seek to reconcile the seeming inconsistency so as to preserve the verdict, it did

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[10] One of several comments edited out of the broadcast which would have exonerated petitioner had it been aired, and which gave respondent reason to know that its portrayal of petitioner was false.

the opposite. Although its duty was to view the evidence in the light most favorable to the verdict winner, it did not. In fact, the Court's Opinion makes no attempt to explain the process of its analysis.

Adopting the least plausible view of the verdict and the one most hostile to the verdict winner, and ignoring the relevant evidence, the Court dispensed with any further need for it to examine that aspect of petitioner's claim which had to do with illegal dumping. The Court had whittled down petitioner's complaint by an act of ledgerdemain. From that point on, the Court's discussion assumed that chemical dumping was out of the case and there was no further mention of dumping in the decision. The analysis proceeded on the premise that petitioner could only argue that the jury had found that he had been falsely portrayed as intemperate and evasive.

Falsity and the Portrayal of Petitioner as Intemperate and Evasive

The Court, examining the now truncated version of petitioner's claim, adverted for the first time to the standard of review on a motion for judgment n.o.v.. "[W]e must view the evidence in the light most favorable to the plaintiff to determine whether the evidence was sufficient to allow a reasonable juror to conclude that there was falsity in the portrayal of the plaintiff as intemperate and evasive." App. A at 27. Having noted the standard, the Court simply ignored it.

Judge Cardamone ruled as a matter of law that because the portrayal was "based on [petitioner's] own conduct which was accurately captured by the cameras," it could not be false. App. A at 27-28. In other words, every photographic record of an individual is, per se, a truthful portrayal of that person: the camera does not lie. The fallacy of that analysis—which, not incidentally, ignored the precedents in other Circuits sustaining false light claims based upon photographic portrayals—is that it refused to acknowledge the catalyst which caused petitioner's behavior.

The record reflects the provocative and hostile context in which the interview was conducted which caused petitioner's disorientation and anger. The reporter refused to abide by

petitioner's request that the interview not be filmed, and pressed his questions which insinuated that the petitioner was involved in the dumping of wastes or knew why the wastes had been dumped, how they got there and who dumped them. The reporter as provocateur, precipitated the reaction which when filmed, edited, and placed in an artfully contrived context, portrayed the petitioner in a false and highly offensive way.

The record reflects that the suddenness of the incident and petitioner's surprise and lack of preparedness contributed to his reaction. Without any forewarning, while leaving his office to keep a business appointment, petitioner found himself the target of a television news team with a reporter who, to him, seemed evidently bent on ascribing the dumping to him and his company.

The record reflects that the portrayal was not accurate and complete but was controlled and fashioned by respondent. The interview was not telecast live but was filmed and then edited by CBS. Petitioner had every reason to be apprehensive, given the tenor of the reporter's questions, that any filmed interview to which he submitted would be distorted in the editing process to show him in the most unfavorable light. And it was. CBS was in total control of the manner in which petitioner would be portrayed to the public. Its reporter, film editor, and news director were highly experienced in the art of communication. The segment of the interview most favorable to petitioner was omitted—a deliberate decision by the CBS staff. Moreover, the reporter's on camera comments describing the interview with the petitioner were filmed after the interview had been conducted and then inserted before it, thus further tainting the portrayal.

The record reflects that CBS' own expert had conceded that the television audience watching the report could get the impression that petitioner had been involved in chemical dumping, that an interviewee could be shown in a bad light if taken by surprise by a television reporter and camera crew, that a reporter's use of loaded questions could distort the truth, that the truth could be distorted in the case where an interviewee is placed under pressure, and that an unwilling

interviewee taken by surprise could be made to look foolish, guilty and evasive. CBS' expert testified that "the ambush technique could put an individual in an unnecessary bad light or false light that could make it unacceptable." Trial Record at 1328, 1388, 1395-1397.

The record reflects that not only was the petitioner depicted in his private persona as being intemperate, hostile, and inclined to irrational behavior, but that he was also perceived in that light in his business persona and made to look foolish, undignified and somehow involved in the illegal dumping of chemical wastes.

Furthermore, petitioner's claim that he had been falsely portrayed as "evasive," employed that term not in an abstract or general sense (that is, "evasiveness" as a constant or recurrent trait in petitioner's personality) but—as it was argued to the jury—in the particular and concrete context of petitioner being implicated in the illegal disposal of dangerous chemicals. Judge Cardamone simply failed to deal with the fact that the jury had found that petitioner had been shown as evasive in a specific criminal context. In the Court's approach, the two words "intemperate and evasive," repeated in tandem, merged, so that "evasive" lost the full and independent meaning which it had throughout the lawsuit.

The final point in the Court's "falsity" analysis was Judge Cardamone's only discussion of the existence and weight of any of the evidence in the case. Singling out for discussion the testimony of only one trial witness, a business associate of petitioner, Judge Cardamone dismissed as insufficient all evidence that petitioner's usual temperament had been distorted by the broadcast. App. A at 28. Exactly why the testimony of that particular witness was deemed insufficient, was not stated. More importantly, the Court ignored all of the following, which under its own articulation of the applicable standard of review, it was required to marshal and examine in the light most favorable to petitioner: the jury (and trial judge) heard and observed petitioner testify in his own behalf, and had an opportunity to observe his demeanor in the courtroom over a period of four weeks. Respondent's reporter, Diaz, had testified that petitioner's demeanor changed; that petitioner had

been calm when first approached and did not become agitated until after his requests to turn off the camera were refused. Trial Record at 429. A Coast Guard officer had testified as to petitioner's cooperativeness. Trial Record at 984. Fire Chief Miller testified that petitioner had been cooperative with him on the date of the incident, but had shown anxiety because he thought CBS was blaming him for the dumping of the barrels. Trial Record at 1051-1052. Respondent's staff counsel, Mr. Jaeckel, testified that when he received petitioner's call on the day of the broadcast petitioner was "agitated" and sounded concerned because he feared the broadcast would be accusatory. Trial Record at 850. Finally, petitioner's business acquaintance, Mr. Kulpa, testified as to his knowledge of petitioner's temperament and behavior based upon observations over a long period of years. Trial Record at 1020, 1026. There was absolutely no evidence that petitioner was known or reputed to be intemperate. The jury and Judge Leisure clearly believed that petitioner's temperament had been grossly and purposely distorted by the respondent. In sum, the Appellate Court made no attempt to examine the record in respect of the falsity of the portrayal of the petitioner's temperament, and failed entirely to deal with the false portrayal of petitioner as evasive in the context of the story on illegal dumping.

The Highly Offensive Standard

Judge Cardamone's analysis of the false light claim concluded with a consideration of whether his truncated version of that claim was highly offensive to a reasonable person.

Although establishing offensiveness in a false light case is quintessentially a matter for the trier of fact Judge Cardamone ruled as a matter of law that the portrayal was inoffensive.

There is no clear rationale for Judge Cardamone's conclusion: he discussed neither the particular facts of the case nor the effect of the portrayal on the petitioner. He rested his result on the statement that courts have "narrowly construed the highly offensive standard" in cases in which First Amendment rights are implicated, but he neither developed that

thought nor provided guidance as to how any such altered standard is to be applied. App. A at 29-30.

Thus, the Court of Appeals expanded the penumbra of the First Amendment in this case to further immunize the media from liability.

Improper Publicity to Private Facts

The Court of Appeals affirmed the summary judgment court's dismissal of petitioner's claim that his privacy had been invaded by respondent's publicizing of a private and embarrassing encounter in which the public had no legitimate concern.[11]

The rationale of the Appellate Court's reversal had three prongs: the filmed encounter took place "in a semi-public area while plaintiff knew the cameras were rolling"; respondent could not be liable for giving "further publicity" to the petitioner's public behavior; and as it had noted with respect to the false light claim, the portrayal was not highly offensive. App. A at 30-31.

This interpretation of the tort conflicts with the decisions of other courts and avoids the facts of this case.

The encounter took place on petitioner's business property in a secluded industrial area. No one observed the encounter other than the participants. The reporter and camera crew did not simply happen upon petitioner and film him while he was acting in an erratic and intemperate manner; they were, in fact, the cause of his behavior as it was their provocation which upset his calm and their persistent goading which impelled him to behave in a highly uncharacteristic way.

Consequently, the location of the event would in this case be irrelevant. The fact that petitioner acted while he knew

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[11] The definition of this theory of liability for invasion of privacy is set forth in the Restatement (Second) of Torts § 652 D, as follows:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

that the cameras were rolling begs the issue: he was an involuntary subject placed unexpectedly in a situation from which he tried to extricate himself; the rolling cameras were the very cause of his behavior, and the fact that he knew he was being filmed does not justify the later publication of that film. As for the Court's comment that respondent was merely giving "further publicity" to petitioner's behavior, there was no prior publicity of the event; respondent gave it the *only* publicity.

Significantly, the trial judge had commented in his decision denying respondent's post-trial motions that "[t]he evidence suggested that the film [of Diaz' encounter with petitioner] was used in order to lend some excitement to an otherwise uneventful story." App. B at 14.

ARGUMENT

I. THE COURT OF APPEALS DEPRIVED PETITIONER OF HIS SEVENTH AND FOURTEENTH AMENDMENT RIGHTS IN ADOPTING A VIEW OF THE CASE, UNSUPPORTED BY THE EVIDENCE, WHICH MADE THE JURY'S SPECIAL VERDICTS INCONSISTENT

Although the District Court reconciled the jury's answers to two special interrogatories, each within separate verdicts, the Court of Appeals ignored the mandate of the Seventh and Fourteenth Amendments, and perceiving a "seeming inconsistency," adopted a view of the case which negated the jury's verdict in favor of petitioner on false light invasion of privacy.

The Seventh Amendment provides with respect to civil suits that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The Amendment sets "the federal policy favoring jury decisions of disputed fact questions (cites omitted)." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, *reh'g denied*, 369 U.S. 882 (1962) (this Court, noting and heeding the constitutional imperative that it view a jury's answers to special interrogatories so as to reconcile them—that is, to sustain the verdict—suggested a third possible view of the case not considered by the Court of Appeals which reconciled the jury's findings).

Where there is a view of the case that makes the jury's answers to special interrogatories or special verdicts consistent, the Seventh Amendment requires that they must be resolved that way. *Gallick v. Baltimore and Ohio Railroad Co.*, 372 U.S. 108 (1963) (where the Court of Appeals overturned a jury verdict on grounds of insufficient evidence and an irreconcilable inconsistency between two special interrogatories, this Court held "[w]e therefore must attempt to reconcile the jury's findings, by exegesis if necessary . . .before we are free to disregard the jury's special verdict and remand the case for a new trial." *Id.* at 119. In reconciling the jury's finding that the cause of petitioner's injury was not foreseeable, with their verdict for petitioner on respondent's negligence, this Court looked at the seeming inconsistency in the context of the trial judge's charge and the total context of the special verdict, and concluded that the inconsistency was not of sufficient weight to warrant overturning the jury's verdict.); *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986) (the Second Circuit sustained a verdict that police officers were liable for violating plaintiff's constitutional rights although the jury found under a separate claim that the defendant police officers did not maliciously and wantonly assault plaintiff. Reconciling the special finding and the verdict, the Court considered that the jury "was entitled to believe parts and disbelieve parts of the testimony of any given witness" and, further, that the jury was asked to find different facts on each claim. "Within the framework of these instructions and the language of the interrogatories, the jury could have found that the officers had used excessive force against [plaintiff] in violation of her constitutional rights, and that they should have known that they were violating those rights, but that their acts were not malicious. Viewed in this light, the jury's answers to the interrogatories finding the officers liable to [plaintiff] for violation of her constitutional rights but not for a malicious assault are not inconsistent." *Id.* at 325-326); *see also Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 748-749 (2d Cir. 1984).

A "search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores*, 369 U.S. at 364. The Court of Appeals' decision in the instant case has

caused such a collision. The Seventh Amendment requires the appellate court to search for any logical or evidentiary basis in the record which would reconcile the jury's answers to special interrogatories which are seemingly in conflict.

The analytic process employed by this Court as well as by the Second Circuit in *Fiacco* and *Martell*, in endeavoring to reconcile seeming inconsistencies in special interrogatories or verdicts, requires an examination of the trial court's charge on the law and facts attendant to each interrogatory or claim to see whether the jury could have either misconstrued the charge or relied on certain nuances of each claim which could rationalize its answers. Whatever view of the case the reviewing court determines was adopted by the jury, that view must be supported by evidence or reasonable inferences drawn from the evidence. *See Morgan v. Consolidated Rail Corp.*, 509 F.Supp. 281, 284 (S.D.N.Y. 1980).

> Inconsistent jury verdicts upon different counts or claims are not an anomaly in the law, which at times recognizes a jury's right to an idiosyncratic position, provided the challenged verdict is based upon the evidence and the law.

Morgan, 509 F.Supp. at 284 *(citing Malm v. United States Lines Co.*, 269 F.Supp. 731, 732 [S.D.N.Y.], *aff'd*, 378 F.2d 941 [2d Cir. 1967]); *Electro-Miniatures Corp. v. Wendon Co., Inc.*, 771 F.2d 23 (2d Cir. 1985); *see also Smith v. Shell Oil Co.*, 746 F.2d 1087, 1092 (5th Cir. 1985); *Henry v. A/S Ocean*, 512 F.2d 401 (2d Cir. 1975).

Here, the Second Circuit failed to carry out its Seventh Amendment obligation to choose that view of the case which would sustain the verdict, to search the record for evidence or any favorable inference from the evidence to reconcile the jury's findings that Irving Machleder was falsely portrayed as somehow involved in the illegal dumping of chemical wastes while also finding that he had not been libeled. In adopting a view of the case that the fact finding of no substantial falsity on the libel claim pre-empted the jury's consideration of whether Machleder was falsely portrayed as an accessory in the illegal dumping under the false light claim (and thereby concluding that the jury perceived Machleder as the dumper), the Court of Appeals ignored the differences between the two

causes of action (although acknowledging that they are different), the differences in the charges to the jury, and the substantial evidence supporting the jury's special verdict for petitioner on the false light invasion of privacy claim.

The jury was properly instructed to consider different facts in deciding what was false on each claim. Trial Record at 1819-1820. The libel claim required the jury to find that the broadcast falsely stated that petitioner was *the* dumper; the false light claim required the jury to find that the broacast falsely portrayed petitioner as having been involved in the dumping, as seeking to conceal his participation in that activity, and as intemperate. Moreover, as petitioner argued to the Court of Appeals, the jury could have misconstrued the defamation charge as it directed them to look for false statements of fact, rather than focusing on the false impression that a television broadcast can convey. There is no evidence in the record that the jury misconstrued the false light charge or misapplied the law as charged by Judge Leisure.

Further, the Court of Appeals disregarded the substantial evidence in the record from which the jury could (and apparently did) reasonably infer that petitioner was made to appear guilty of complicity in illegal conduct, and that this false portrayal was contrived by respondent in using the ambush interview technique, in selecting for the broadcast only the portions of the footage most calculated to show the petitioner in the most unfavorable way, in using portions of the interview with the fire chief which, distorted by editing, suggested a serious hazzard, and in editing out all exculpatory material which would have dispelled *any inference* that petitioner had been involved in the dumping.

II. ASSUMING THAT THE COURT OF APPEALS MADE ALL REASONABLE EFFORTS TO RECONCILE THE SPECIAL VERDICTS, BUT FAILED, IT SHOULD HAVE REMANDED FOR RETRIAL THE ISSUE OF FALSITY RATHER THAN DISMISS THE PETITIONER'S COMPLAINT

In vacating the verdict for petitioner, the Court of Appeals failed to reconcile the "seeming inconsistency" upon which respondent's appeal centered. While the Court had the power to grant a retrial on the jury's factual findings of "falsity," which, to the Court, gave rise to the conflict, it erroneously reversed the verdict and dismissed petitioner's complaint. An appellate court has general authority, upon vacating a judgment, to "require such further proceedings to be had as may be just under the circumstances." *Akermanis v. Sea-Land Service, Inc.*, 688 F.2d 898, 904 (2d Cir. 1982), *cert. denied*, 461 U.S. 927 (1983), *citing* 28 U.S.C. § 2106 (1976), (Rule 50[d] of the Federal Rules of Civil Procedure is a variation on the general authority of an appellate court to remand an issue for retrial).

"If after a review of the district court's judgment no reconciliation is possible and the inconsistency is such that the special verdict will not support the judgment entered below or any other judgment, then the judgment must be reversed and the *case remanded for a new trial.*" 5A J.Moore & J. Lucas, *Moore's Federal Practice* § 49.03, at 49-31—49-32 (2d ed. 1986) (emphasis added); *Cf. Iacurci v. Lummus Co.*, 387 U.S. 86 (1967) (this Court held that it was error for the Court of Appeals to reverse for lack of evidence the trial court's judgment and direct judgment for respondent instead of remanding the case to the trial judge to pass upon the question of a new trial.); *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 772-773 (5th Cir. 1976), *reh'g denied*, 561 F.2d 831 (5th Cir. 1977); *Bernardini v. Rederi A/B Saturnus*, 512 F.2d 660, 662 (2d Cir. 1975) (where the jury was charged that a finding of unseaworthiness was a *precondition* to a finding of negligence, and the jury found the vessel seaworthy but the shipowner negligent, and, further, evidence did not support the jury's

verdict, the Second Circuit held that the proper remedy was to send the matter back for retrial).

Bernardini summed up the constitutional imperative which should have determined the Second Circuit's course in the instant case if it found itself unable to sustain the verdict for petitioner:

> The Supreme Court has said that the Seventh Amendment requires a court to adopt that view of a case under which a jury's special verdicts may be seen as consistent. Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355, 364, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962). However, when special verdicts cannot be reconciled, or when a jury's answers to interrogatories cannot be reconciled with its verdict, the court may not enter a judgment. Royal Netherlands S.S. Co. v. Strachan Shipping Co., 362 F.2d 691 (5 Cir. 1966), cert. denied, 385 U.S. 1004, 87 S.Ct. 708, 17 L.Ed.2d 543 (1967); Martin v. Gulf States Utilities Co., 344 F.2d 34 (5 Cir. 1965). See Turchio v. D/S A/S Den Norske Africa, 509 F.2d 101 (2 Cir. 1974). If judgment has been entered inappropriately, the proper appellate remedy is to remand for a new trial. *Turchio, supra*, at 106.

Id. at 662.

III. THE COURT OF APPEALS DISREGARDED THE SEVENTH AND FOURTEENTH AMENDMENTS AND THE DECISIONS OF OTHER CIRCUITS IN DETERMINING THAT THERE WAS INSUFFICIENT EVIDENCE OF A FALSE PORTRAYAL AND THAT THE PORTRAYAL OF MACHLEDER WAS INOFFENSIVE AS A MATTER OF LAW

Though the Court of Appeals stated correctly the common law standard of appellate review for reviewing the District Court's denial of defendant's motion for judgment notwithstanding the verdict,[12] it failed to abide by that standard and

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[12] The Court cited to *Schwimmer v. SONY Corp. of America*, 677 F.2d 946 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982), *reh'g denied*, 459 U.S. 1189 (1983).

intruded upon the jury's function of finding facts and weighing the credibility of witnesses. Further, in limiting its review of the false light verdict to whether Machleder was portrayed as intemperate and evasive and not whether he was portrayed as somehow involved in the illegal activity of dumping toxic waste, the Court ignored all of the evidence in the record which supported the jury's award in favor of petitioner.[13] The view of the case adopted by the Court of Appeals—that the jury could have found Machleder to be the dumper—tainted its entire review of the sufficiency of the evidence, and, therefore, its determination is completely erroneous.

Falsity

The Court of Appeals found the evidence of a false portrayal of Machleder insufficient "since it was based on his own conduct which was accurately captured by the cameras." App. A at 27-28. In so holding, the Second Circuit posits that a reaction or response captured on camera is an accurate portrayal as a matter of law. This conflicts with other Circuit holdings that the context in which an accurate photograph is placed can create a false portrayal sufficient to constitute a false light invasion of privacy. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, _U.S._, 106 S.Ct. 1489 (1986); *Braun v. Flynt*, 726 F.2d 245 (5th Cir.), *reh'g denied*, 731 F.2d 1205 (5th Cir.), *cert. denied sub nom., Chic Magazine, Inc. v. Braun*, 469 U.S. 883 (1984); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir.), *reh'g denied*, 744 F.2d 94 (5th Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985); *Faber v. Condecor, Inc.*, 195 N.J. Super. 81, 477 A.2d 1289 (N.J. Super. Ct. App. Div.), *certif. denied*, 99 N.J. 178, 491 A.2d 684 (1984);

In *Douglass v. Hustler Magazine*, the Fifth Circuit held that the unauthorized use of a model-actress' photograph in Hustler magazine (an *accurate photograph* posed for by plaintiff) was sufficient evidence to sustain the jury's false light

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[13] [W]e must view the evidence in the light most favorable to the plaintiff to determine whether the evidence was sufficient to allow a reasonable juror to conclude that there was falsity in the portrayal of the plaintiff *as intemperate and evasive*. (emphasis added).

App. A at 27.

verdict in her favor; that to be depicted as voluntarily associated with that publication was degrading, and, further, that plaintiff was portrayed as a lesbian. In reviewing the sufficiency of the evidence, the Court reasoned that since nothing in the feature (picture and commentary) even suggested that the nude photographs appeared without the subject's permission, it was reasonable to perceive that she voluntarily submitted the photographs to the magazine.

Further, while the Court did not think that the plaintiff was portrayed as a lesbian, it held that the commentary by the magazine next to a photograph of plaintiff with another woman could have led a reasonable jury to infer that plaintiff was being represented to be a lesbian. "And of course the issue for us is not whether the jury was right but whether a reasonable jury could have found a false-light tort on the facts of this case." *Id.* at 1137; *see also Braun v. Flynt*, 726 F.2d at 253 ("In reaching our conclusion [upholding the jury's verdict of false light invasion of privacy in favor of petitioner], we have remained ever mindful that we sit as a court reviewing the verdict of Mrs. Braun's peers; we do not, cannot, and should not sit as jurors whose job it is ultimately to determine whether the publication was false and offensive.").

Here, the broadcast concealed the fact that Machleder was ambushed by Diaz and his crew and provoked to anger by the conduct of the news team. Respondent deliberately edited out introductory footage of Machleder's statement delivered in relative calm, "I don't want to be on television, I'm sorry, I'm sorry." The false impression conveyed by the broadcast was that Machleder's reaction was not provoked by the television cameras and the reporter, but, rather, by a guilty association with the dumping of toxic wastes.

In deciding that as a matter of law the portrayal of petitioner was accurate, the Court relied solely on the broadcast tape and ignored the outtakes, petitioner's own testimony, CBS expert Jeffrey Rosser's testimony concerning ambush interviews, CBS news director Stephen Cohen's testimony concerning "confrontation interviews" and the transcript of CBS' broadcast "Watching the Watchdog" concerning the potential

for distortion by use of the technique known as the "ambush" interview.[14]

By ignoring the petitioner's testimony, the Court gave it no weight—and failed to give deference to the jury's and, indeed, the trial court's estimation of petitioner's credibility and demeanor during the trial. Only the jury can determine the weight and credibility of the testimony; "[t]hat part of every case, such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function." *Aetna Life Insurance Co. of Hartford, Connecticut v. Ward*, 140 U.S. 76, 88 (1890).

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[14] "Watching the Watchdog" was an hour-long televised presentation by CBS Inc., which critiqued the value of certain investigative reporting techniques, including the ambush interview. Pl. Exh. 13.

CBS described an "ambush" interview as a technique

> used most often after someone has indicated he will not talk . . . and the ambush interview provides dramatic pictures. . . Suddenly the camera is moving and that provides a sense of excitement—especially when the *confrontation* is near . . . The danger, of course, is that it is designed for *drama*, not to elicit the truth . . . it runs the risk of making *an innocent man look guilty*, and it may miss an important side of the story. (emphasis added).

Fred Friendly, former president of CBS News, dean of the Columbia School of Journalism, and one of the most widely respected authorities on electronic journalism, described the ambush interview on "Watching the Watchdog" as "the dirtiest trick" in broadcasting.

Stephen Cohen, CBS' news director in May, 1979, described Diaz' encounter with Machleder as a "confrontation" interview, and defined a "confrontation" interview as "outside the normal range of the interview process," "where the respondent in an interview is either not responsive or in some way upset with the reporter's questions," (Trial Record at 622) or where the participant in the interview "was less than cooperative, totally uncooperative, or downright hostile." Trial Record at 625. *See also* Note, *The Ambush Interview: A False Light Invasion of Privacy?*, 34 Case W. Res. L. Rev. 72 (1983).

An appellate court is admonished to review the evidence (1) as tending to support the jury's verdict; (2) in a light most favorable to the findings of the jury; and (3) as giving the party having the verdict the benefit of every favorable inference reasonably justified by the evidence. *Gallick v. Baltimore and Ohio Railroad Co.*, 372 U.S. 108 (1963); *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, (1959); *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, *reh'g denied*, 321 U.S. 802 (1944); *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 747 (2d Cir. 1984); *Ebker v. Tan Jay International, Ltd.*, 739 F.2d 812 (2d Cir. 1984). Moreover, the appellate court *cannot* 1) weigh the evidence factually as a jury does or 2) substitute its judgment of the facts for that of the jury. *Gallick*, 372 U.S. at 115; *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 167-168 (2d Cir. 1980).

The Second Circuit went beyond the permissible scope of appellate review in weighing the testimony of James Kulpa, a long-time business associate of petitioner, by holding that "the only evidence on plaintiff's temperament came from a business associate who, though he had done business with the plaintiff, saw Machleder only for fifteen minutes every three months." App. A at 28. This is a clear example of the Court's refusal to view the evidence in a light most favorable to the findings of the jury since the witness testified that he knew petitioner in 1979 for sixteen years. The jury may have given great weight to Mr. Kulpa's testimony about petitioner's character and that Kulpa, having seen the broadcast, called petitioner the day after and asked him whether it was true that he "was dumping barrels around." Trial Record at 1028. Only when there is a complete absence of probative facts to support the conclusion reached by the jury, does a reversible error appear. *Lavender v. Kurn*, 327 U.S. 645 (1946).[15]

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[15] Instead of dismissing petitioner's complaint on the ground of insufficient evidence the Second Circuit should have remanded the case for a new trial. *Neely v. Eby Construction Co., Inc.*, 386 U.S. 317, 327, 329, *reh'g denied*, 386 U.S. 1027 (1967).

Offensiveness

In determining that "no reasonable juror could have concluded that the alleged portrayal was highly offensive"[16] (App. A at 29), the Second Circuit lost sight of the essence of false light invasion of privacy.

> The interest protected by this Section [652 E] is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than he is.

Fogel v. Forbes, Inc., 500 F.Supp. 1081, 1088 (E.D. Pa. 1980).

The Second Circuit went far beyond the scope of appellate review in substituting its own judgment for that of the jury. The cases cited by the Second Circuit to support its finding that as a matter of law the portrayal was inoffensive and should not have reached the jury, *Cibenko v. Worth Publishers, Inc.*, 510 F.Supp. 761 (D.N.J. 1981) and *Bisbee v. John C. Conover Agency, Inc.*, 186 N.J. Super. 335, 452 A.2d 689 (N.J. Super. Ct. App. Div. 1982), are distinguishable from the instant case.

In *Cibenko* and *Bisbee*, causes of action for false light invasion of privacy were dismissed on summary judgment since the communications were not capable of bearing the meaning or innuendo alleged by the plaintiffs; in *Bisbee*, there was *no dispute* about the truth of the communication. Where the communication is capable of bearing the meaning which is highly offensive to a reasonable person, it is for the jury to determine whether that meaning was conveyed. Here, the Second Circuit never questioned whether the broadcast was susceptible of the meaning or impression alleged by petitioner; rather, it held that the meaning was neither false nor offensive.

The Second Circuit stated as a general proposition that "courts have narrowly construed the highly offensive standard." App. A at 29. That general principle is not borne out by

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[16] Again, the Second Circuit's analysis is deficient since it improperly restricted its review to whether the portrayal of petitioner as *intemperate and evasive* was offensive; and not whether the portrayal that he seemed somehow involved in the illegal activity of dumping was highly offensive.

any of the cases cited by the Court; furthermore, it is clear that the offensiveness determination is a factual one. In the majority of cases cited by the Second Circuit,[17] the issue of offensiveness went to the jury and the jury found for the plaintiff. *See Time, Inc. v. Hill*, 385 U.S. 374 (1967) (case remanded); *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974); *Douglass v. Hustler Magazine*, 769 F.2d at 1128.

Contrary to the Second Circuit's appraisal of the above cases, the Courts did not take a narrow view of whether the particular communication or portrayal was offensive. In each case, the Court held that the plaintiff was made to seem pathetic or ridiculous, causing plaintiff to suffer mental distress. *Time, Inc. v. Hill* (family falsely portrayed as victims of certain indignities); *Cantrell v. Forest City Pub. Co.* (family falsely portrayed as being poor and living in dilapidated housing); *Douglass v. Hustler Magazine*, (actress—model who posed for nude photographs for *Playboy* falsely portrayed as voluntarily associated with vulgar magazine).

Indeed, none of the cases cited by the Second Circuit reached the level of offensiveness created by CBS' portrayal of Irving Machleder in the May 22, 1979 broadcast—here, whether or not respondent accused Machleder of being *the* dumper, the impression deliberately created was that he was somehow involved in the illegal activity and was irrational in his behavior. Other cases which demonstrate that the Courts do *not* take a particularly narrow view of what is offensive—and where the jury's verdict was upheld are *Braun v. Flynt*, 726 F.2d at 252 (unauthorized use of entertainer's picture in *Chic Magazine* implied that plaintiff approved of the opinions contained therein or that plaintiff consented to having her picture in an explicit sex magazine); *Wood v. Hustler Magazine*, 736 F.2d at 1084 (unauthorized publication of nude photographs of plaintiff in *Hustler Magazine* portrayed plaintiff as consenting to the submission of her photograph in sex

[17] The Second Circuit cited *Virgil v. Sports Illustrated*, 424 F.Supp. 1286 (S.D. Cal. 1976) which is clearly inapposite to this case since the plaintiff in *Virgil* did not dispute that the publication was true; indeed, plaintiff *abandoned* his false light claim. *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

magazine, and attributed lewd fantasies to her); and *Faber v. Condecor*, 195 N.J. Super. at 81 (unauthorized use of family's photograph gave false impression that plaintiff was endorsing competitor's product).

CONCLUSION

The decision below manifests a process of appellate review and a formulation of legal principles which virtually immunize the electronic media from liability for broadcasts which efface the rights of private citizens. The implications of the review procedure employed and legal conclusions reached by the Second Circuit transcend the immediate facts and parties in this case. For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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December 5, 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of September one thousand nine hundred and eighty-six

Present:

HON. AMALYA L. KEARSE,
HON. RICHARD J. CARDAMONE,
HON. MILTON POLLACK, District Judge.*
Circuit Judges,

85-7917
85-7943

IRVING MACHLEDER and
FLEXCRAFT INDUSTRIES, INC.,

Plaintiffs,

IRVING MACHLEDER,

Plaintiff-Appellee, Cross-Appellant,

—v.—

ARNOLD DIAZ, CBS INC., WCBS-TV, ANN SORKOWITZ,
FRANK PIVALO, THOMAS GALLAGHER
and DENNIS P. COYNE,

Defendants,

CBS INC.,

Defendant-Appellant, Cross-Appellee.

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*Hon. Milton Pollack, Senior United States District Court Judge, Southern District of New York, sitting by designation.

IRVING MACHLEDER and FLEXCRAFT INDUSTRIES, INC.,

Plaintiffs-Appellants,

—v.—

ARNOLD DIAZ, CBS INC., WCBS-TV, ANN SORKOWITZ, FRANK PIVALO, THOMAS GALLAGHER and DENNIS P. COYNE,

Defendants,

ARNOLD DIAZ, CBS INC., WCBS-TV, FRANK PIVALO, THOMAS GALLAGHER and DENNIS P. COYNE,

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the complaint is dismissed in accordance with the opinion of this court. Further ordered that the cross-appeal be and it hereby is affirmed in accordance with this court's opinion.

ELAINE B. GOLDSMITH,
CLERK

s/Edward J. Guardaro
EDWARD J. GUARDARO,
DEPUTY CLERK

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 864, 1006—August Term 1985

(Argued March 10, 1986 Decided September 10, 1986)

Docket Nos. 85-7917, 85-7943

IRVING MACHLEDER and FLEXCRAFT INDUSTRIES, INC.,

Plaintiffs,

IRVING MACHLEDER,

Plaintiff-Appellee, Cross-Appellant,

—v.—

ARNOLD DIAZ, CBS INC., WCBS-TV, ANN SORKOWITZ, FRANK PIVALO, THOMAS GALLAGHER and DENNIS P. COYNE,

Defendants,

CBS INC.,

Defendant-Appellant, Cross-Appellee.

IRVING MACHLEDER and FLEXCRAFT INDUSTRIES, INC.,

Plaintiffs-Appellants,

—v.—

ARNOLD DIAZ, CBS INC., WCBS-TV, ANN SORKOWITZ, FRANK PIVALO, THOMAS GALLAGHER and DENNIS P. COYNE,

Defendants,

ARNOLD DIAZ, CBS INC., WCBS-TV, FRANK PIVALO, THOMAS GALLAGHER and DENNIS P. COYNE,

Defendants-Appellees.

Before:

KEARSE and CARDAMONE, *Circuit Judges* and POLLACK, *District Judge**

Arnold Diaz, CBS Inc., WCBS-TV *et. al.*, defendants-appellants, appeal from a judgment entered in the Southern District of New York (Leisure, J.) in favor of Irving Machleder and Flexcraft Industries, Inc., plaintiffs-appellees-cross-appellants that awarded the individual plaintiff Machleder $250,000 in compensatory damages and $1 million in punitive damages for false light invasion of his privacy.

* Hon. Milton Pollack, Senior United States District Court Judge, Southern District of New York, sitting by designation.

Reversed and complaint dismissed.

Cross-appeal affirmed.

HAROLD R. TYLER, JR., New York, New York (Paul G. Gardephe, Patterson Belknap Webb & Tyler, New York, New York; Pamela G. Ostrager, Laura R. Handman, Coudert Brothers, New York, New York, of counsel), *for Defendant-Appellant, Cross-Appellee CBS Inc.*

ROBERT A. MACHLEDER, New York, New York (Marcia E. Kusnetz, Wien, Malkin & Bettex, New York, New York, of counsel), *for Plaintiff-Appellee, Cross-Appellant Irving Machleder and Plaintiff-Cross-Appellant Flexcraft Industries, Inc.*

MICHAEL P. MCDONALD, American Legal Foundation, Washington, D.C., filed a brief *Amicus Curiae.*

CAHILL GORDON & REINDEL, New York, New York (Dean Ringel, Floyd Abrams, Ellen H. Woodbury, New York, New York; Paula Jameson, New York, New York; Slade Metcalf, Squadron, Ellenoff, Plesent & Lehrer, New York, New York; Katharine P. Darrow, George Freeman, New York, New York; Ralph P. Huber, Sabin, Bermant & Blau, New York, New

York; Harry M. Johnston, III, New York, New York; Sandra S. Baron, New York, New York; Sam Antar, New York, New York; Milford Fenster, Hall, Dickler, Lawler, Kent & Friedman, New York, New York; Muriel Henle Reis, New York, New York, all of counsel), filed a brief for *Amici Curiae, Dow Jones & Company, Inc., News America Publishing Incorporated, The New York Times Company, Newark Morning Ledger Co., Time Incorporated, National Broadcasting Company, Inc., Capital Cities/ABC, Inc., and Metromedia, Inc.*

CARDAMONE, *Circuit Judge*:

Plaintiffs brought defamation and false light invasion of privacy actions against CBS and several of its employees. After plaintiffs were awarded jury verdicts totaling over a million dollars in compensatory and punitive damages, this appeal ensued. Arrayed on either side of the issues to be decided are the competing concerns of the privacy rights of individuals on the one hand, and the constitutional guarantee of freedom of the press on the other. The private individual plaintiff claims that defendants made him the subject of a public news report that portrayed him in a false light and thereby infringed on his right to be left alone. The defendant responds that its report concerning plaintiff was not in fact false, and further urges that to hold the media liable for reporting

which is not factually untrue will stifle freedom of the press by denying it the breathing space it needs to survive.

History suggests that individual rights to privacy are actionable when the media portrays an individual falsely, but not otherwise. Although Madison acknowledged in his day that the press was checquered with abuse of individual rights, he still spoke eloquently of its triumphs over error and oppression. L. Brant, *James Madison Father of the Constitution* 1787-1800, 469 (1950). And Jefferson also wrote from Paris: "Our liberty depends on freedom of the press, and that cannot be limited without being lost." Letter to Thomas Currie, (January 28, 1786), *reprinted in* 9 *The Papers of Thomas Jefferson* 215 (Boyd ed. 1954). Jefferson perceptively observed in a letter to Madison on July 31, 1788 that freedom of the press "will not take away the liability of the printers for false facts printed." 13 *Id.* at 442. First Amendment guarantees are not for the press alone, but for the benefit of all; to that end a "broadly defined freedom of the press [helps assure] the maintenance of our political system and an open society." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). Hence, it would unjustifiably contradict the theory underlying that guaranteed freedom were the law to limit accurate reporting. In consequence, we hold that to sustain a false light invasion of privacy claim, such portrayal must be substantially false and offensive to an ordinary person. Here, because the portrayal of plaintiff as intemperate and evasive was neither actionable nor false, and further because the charge that he was falsely portrayed as an illegal dumper was not sustained by the jury on the defamation claim, this verdict cannot stand.

I BACKGROUND

A. *Facts*

On May 22, 1979 WCBS-TV, a Manhattan television station owned and operated by CBS, Inc. (CBS), aired a report on its 6 o'clock news dealing with the dumping of toxic chemicals at a site in Newark, New Jersey. The broadcast highlighted the investigation of CBS reporter Arnold Diaz, then WCBS-TV's New Jersey investigative correspondent, and focused on his interview with plaintiff, Irving Machleder, the owner of a company that uses hazardous chemicals in its blending operations. As a result of this broadcast, Machleder brought a diversity action in the United States District Court for the Southern District of New York (Duffy, J.) alleging libel, false light invasion of privacy, assault and battery, and trespass. A district court jury awarded the plaintiff $250,000 in compensatory damages and $1,000,000 in punitive damages on his false light privacy claim.

The invasion of Machleder's privacy that he claims cast him in a false light arose from what plaintiff alleges was Diaz' "ambush" or "confrontational" interview. Ambush interview is a derogatory descriptive term for a controversial investigative reporting technique in which a reporter and his news crew intercept an "unsuspecting newsworthy subject on the street and [bombard] him with incriminating accusations ostensibly framed as questions." Note, *The Ambush Interview: A False Light Invasion of Privacy?*, 34 Case W. Res. L. Rev. 72, 72 (1983). The events leading up to the broadcast of this particular news report began on May 21, 1979 when Diaz received a telephone tip from Michael Rosenberg, a then confidential source within the New Jersey Department of Environ-

mental Protection, informing him of a hazardous dumpsite on Avenue P in Newark. Rosenberg had previously provided Diaz with reliable information concerning such sites. From January to May 22, 1979 Diaz had aired an award-winning series of 18 television reports on chemical waste dumping in New Jersey.

On May 22nd Diaz and a film crew went to Avenue P and there found a large, open area that was overgrown with weeds and strewn with hundreds of rusting 55-gallon drums. Many of the drums were labeled "hazardous" and "flammable." Some of them were leaking and their contents were trickling into a nearby waterway. A noxious odor pervaded the whole area. After surveying the site, Diaz and the film crew walked about 25 feet to a nearby building that was occupied by Flexcraft, a manufacturer of paints, adhesives and coatings. Diaz approached the building under the mistaken belief that the abandoned drums he had viewed a few moments earlier were on Flexcraft property. He later learned that the drums were on land owned by the Newark Housing Authority. As he approached the Flexcraft plant Diaz encountered Bruce Machleder, the manager of Flexcraft, who told Diaz "to go to the office" at the front of the building.

Diaz proceeded with his crew to the front of the Flexcraft building where he came upon Irving Machleder. Although the parties' accounts differ as to what transpired next, the substance of the testimony reveals that Diaz approached Irving Machleder—with audio and video cameras rolling—and asked him if he knew anything about the chemical barrels dumped next to his building. Machleder replied that he did not want to be filmed for television and began to move away. Diaz and his crew followed. Machleder became agitated, shouting "get that

damn camera out of here . . . I don't want, I don't need, I don't need any publicity." When Machleder reached the door of his office he said to Diaz, "We don't . . . we didn't dump 'em;" Diaz asked, "Who did?" and Machleder responded, "You call the Housing Department. They have all the information." According to Diaz, he was then invited into the office by Bruce Machleder, who told him that the presence of the barrels had previously been reported to the United States Coast Guard, the New Jersey Turnpike Authority, and the Newark Housing Authority.

After Diaz left the Flexcraft premises he immediately contacted Ann Sorkowitz, a CBS research assistant, asking her to verify Machleder's statements and to dig up any additional information about the barrels that she could. Meanwhile he went to Newark City Hall to make inquiries at the Mayor's office and the Fire Department. Later Diaz returned to the dumpsite and conducted an on-camera interview of a Newark Deputy Fire Chief, who confirmed that this was a hazardous chemical waste site. The reporter then returned with his crew to the WCBS-TV news studio in Manhattan, where he learned from Sorkowitz that two years earlier in 1977 Flexcraft had reported the existence of the 55-gallon drums to the Coast Guard and the Turnpike Authority.

At 4:30 p.m. on the afternoon of the interview, Irving Machleder telephoned CBS and spoke with CBS's counsel. Claiming that he was quite disturbed about his confrontation with Diaz, Machleder asked CBS to delay the broadcast. Counsel told Machleder that he could not stop the program, but that he would forward Machleder's request to the news desk. That evening Diaz' report, as

noted, was televised on WCBS-TV's 6 o'clock Report. The following excerpts are relevant to our analysis.

ARNOLD DIAZ: "Now, just who owns these barrels, what's inside of them and how they got there I really don't know. But I do know there is a small business on the property over there, and I went inside to try to get some answers. So I went to the office of Flexicraft [sic], a company that uses chemicals to make art supplies, and found the manager outside."

FLEXICRAFT [sic] MANAGER: "Get that damn camera out of here."

* * *

ARNOLD DIAZ: "Just tell me why—why are those chemicals dumped in the back . . ."

FLEXICRAFT [sic] MANAGER: "I don't want . . . I don't need . . . I don't need any publicity . . . ."

ARNOLD DIAZ: "Why are the chemicals dumped in the back?"

FLEXICRAFT [sic] MANAGER: "We don't . . . we didn't dump 'em."

ARNOLD DIAZ: "Who did?"

FLEXICRAFT [sic] MANAGER: "You call the Housing Department. They have all the information."

ARNOLD DIAZ: "The manager told me off camera that for years the city has known all about the problem of chemical dumping on the land. So I went to City Hall, where the Mayor's Assistant said the Fire Department would check out the problem immediately."

* * *

> ARNOLD DIAZ: "Late this afternoon I was able to confirm that the owner of Flexicraft [sic] had told state and local authorities about the illegal dumping two years ago, and nothing' been done [sic]. The City of Newark says the State should clean it up. The State says they're investigating, but it's not necessarily their responsibility, because the Newark Housing Authority owns the lands. So the drums still sit there—still leaking."

On May 29, 1979 Machleder's attorney sent a letter to CBS demanding a retraction of the Diaz Report and, when CBS refused to retract any part of it, the present litigation was commenced. After service of the complaint, CBS moved for summary judgment dismissing it.

B. *Proceedings Below*

In *Machleder v. Diaz*, 538 F. Supp. 1364 (S.D.N.Y. 1982) (Duffy, J.), the district court applied New Jersey law and—in ruling on several motions—held that summary judgment was precluded by genuine issues of fact with respect to whether: (1) a reasonable person could conclude that plaintiffs Machleder and Flexcraft dumped the chemicals; (2) CBS acted with the requisite degree of fault in its news broadcast; (3) communication between a CBS employee and public officials was conditionally privileged; (4) CBS may have been liable for false light invasion of privacy; (5) one of the cameraman's alleged touching of Irving Machleder constituted assault. Judge Duffy also held that (6) CBS was not liable for intruding upon the seclusion of Irving Machleder or for giving improper publicity to his private life, and (7) implied consent for Diaz and his crew to be on Machleder's

property precluded CBS' liability for trespass. Ruling on post-trial motions several years later, the district court held in *Machleder v. Diaz*, 618 F. Supp. 1367 (S.D.N.Y. 1985) (Leisure, J.), that the jury's compensatory award of $250,000 on the false light invasion of privacy claim was neither excessive nor outrageous, that CBS acted with actual malice in broadcasting the report, and that the punitive damage award of $1,000,000 was not excessive.

CBS appeals from the compensatory and punitive damages verdict awarded by the jury for the false light invasion of privacy claim. CBS also appeals from each of the following orders: (1) the earlier denial of CBS's motion for summary judgment with respect to the false light claim; (2) the denial of CBS's motion *in limine* seeking to exclude prejudicial and irrelevant evidence regarding a broadcast by a network other than CBS; (3) the denial of certain requests to charge; (4) the denial of CBS's motion for a directed verdict; and (5) the denial of CBS's post-trial motions for judgment notwithstanding the verdict or for a new trial and for remittitur. Irving Machleder cross-appeals from the dismissal of his invasion of privacy claim on a theory of improper publicity given to private facts and Flexcraft cross-appeals from the dismissal of its trespass claim. No appeal has been taken from the district court's dismissal of Machleder's libel claim after the jury rendered a verdict in favor of CBS or his assault and battery claim.

II CHOICE OF LAW

As a threshold matter it is necessary to decide what law should govern. CBS argues that the district court erred when it applied New Jersey law. We disagree. Because

New York was the forum state, the motions judge properly looked to its choice of law rules to determine which state's substantive law to apply. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496-97 (1941); *Mattox v. News Syndicate Co.*, 176 F.2d 897, 900 900 (2d Cir.), *cert. denied*, 338 U.S. 858 (1949). Under New York law a court must apply the substantive tort law of the state that has the most significant relationship with the occurrence and with the parties. *Babcock v. Jackson*, 12 N.Y.2d 473, 482, 240 N.Y.S.2d 743, 752 (1963).

CBS accurately asserts that New York has a strong interest in this litigation, because WCBS-TV is located there, the subject broadcast emanated in Manhattan, and the day-to-day professional activities of CBS are conducted in New York. Yet New Jersey has superior contacts. Irving Machleder was interviewed in New Jersey; the news report was part of a series prepared by CBS's New Jersey reporter; the report aired throughout Northern New Jersey and the tri-state New York City metropolitan area; Irving Machleder is a resident of New Jersey, and Flexcraft is incorporated in New Jersey where it also maintains its principal place of business. Judge Duffy correctly concluded:

> [D]espite the interest of New York in establishing a standard of fault for its news media, New Jersey also has an important competing interest in protecting its citizens from defamation. Coupled with New Jersey's additional interest in governing the fault of those who come within its boundaries to investigate the news and later broadcast it there, these factors call for the application of New Jersey law.

538 F. Supp. at 1370.

III FALSE LIGHT PRIVACY

In order to resolve the issues presented by this appeal, it is helpful to discuss briefly several broad questions before focusing our analysis on the case at hand. Since this appeal concerns a false light invasion of privacy claim, we examine first that tort's elements and defenses, particularly focusing upon whether truth is a defense to a false light claim. Second, we discuss whether—if truth is such a defense—the false light privacy tort has been swallowed-up by and is now synonymous with defamation leaving behind no distinctive identity of its own.

A. *Common Law Approach to Privacy*

Invasion of privacy was first discussed by American legal scholars 96 years ago when two distinguished Bostonians authored an article that recognized as an actionable tort the invasion of a person's privacy. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Rumored to be inspired by Warren's indignant reaction to a gossip column reporting on a family member's wedding breakfast, this influential article has left a permanent imprint on our tort law jurisprudence. *See* Zimmerman, *Requiem For a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291, 295-96 (1983). Seventy years later Dean Prosser surveyed the impact of the new "right to privacy" tort on the law and found that it had been accepted by the overwhelming majority of American courts. Most significant was his conclusion that the invasion of privacy did not give rise to a single tort claim, but rather made actionable the invasion of four distinct privacy interests, which he described as: (1) intrusion upon solitude; (2)

public disclosure of embarrassing facts; (3) publicly casting plaintiff in a false light; and (4) appropriation of plaintiff's name or likeness. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960).

Because Warren and Brandeis were primarily concerned that the press was "overstepping in every direction the obvious bounds of propriety and decency" and publishing "column upon column [that] is filled with idle gossip, which can only be procured by intrusion upon the domestic circle," Warren & Brandeis, *supra*, at 196, it is clear that the generalized right to privacy they had formulated—without defining it—conforms to the second category identified by Dean Prosser, that is to say, the public disclosure of private facts. Zimmerman, *supra*, at 295. Warren and Brandeis concluded that the truth of the matter published does not afford a defense. "Obviously this branch of the law should have no concerns with the truth or falsehood of the matters published." Warren & Brandeis, *supra*, at 218. This statement, of course, had application only to the tort that the authors intended to remedy. Thus, as conceived, this second type of invasion of privacy—the public disclosure of private facts—did not require falsity to state a cause of action. Prosser, *Law of Torts* 814 (4th ed. 1971).

Yet, in Dean Prosser's third category—false light, with which we are here concerned—a different rule has evolved in the common law. To establish a false light cause of action the published matter must be false—and, in addition, it must be highly offensive to a reasonable person.

The first requirement is that the published material contain a false portrayal. The very name of this tort,

"*false* light", indicates that something false must be demonstrated, and the commentators agree that falsity must be shown to state a false light cause of action. Prosser, *On Torts*, *supra*, at 814; Restatement (Second) of Torts § 652E comment b (1977). For 150 years the common law of England recognized the tort of false light invasion of a person's privacy and required a showing of falsity before an injunction would issue. In *Byron v. Johnston*, 35 Eng. Rep. 851 (1816), a publisher advertised for sale certain poems that he represented as being the work of the famous English poet, Lord Byron who, as plaintiff, succeeded in obtaining an injunction restraining their publication because the poems were falsely held out to be his works. Moreover, we recently held that "[i]n a false light case . . . the gravamen of the tort is falsity . . . " *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 135 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2114 (1985).

It follows logically that if falsity is required to state a false light claim, truth must be a defense. It is at this pivotal juncture that a false light claim parts from the other three invasions of an individual's right to privacy—intrusion, public exposure of private facts and appropriation—and moves closer to the common law tort of defamation. Warren and Brandeis themselves recognized that the "right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel. Warren & Brandeis, *supra*, at 216. Truth is now considered one of those privileges. Prosser, *On Torts*, *supra*, at 814. In consequence, truth—as it is in defamation—is a complete defense to a false light inva-

sion of privacy cause of action. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 499 (1975) (Powell, J., concurring).

B. *New Jersey's Falsity Requirement*

New Jersey has adopted the common law approach set forth in the Restatement (Second) of Torts, § 652E which requires falsity to sustain a cause of action for false light invasion of privacy. *Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761, 766 (D. N.J. 1981) (applying New Jersey law); *Bisbee v. John C. Conover Agency Inc.*, 186 N.J. Super. 335, 341-42, 452 A.2d 689, 692 (App. Div. 1982). Section 652E of the Restatement provides:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard *as to the falsity of the publicized matter and the false light in which the other would be placed*. (emphasis added).

For liability to attach under Section 652E the published matter must be false, though not necessarily defamatory. *Cibenko*, 510 F. Supp. at 766; *accord Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983). Comment A to § 652E states, "[I]t is essential to the rules stated in this Section that the matter published concerning the plaintiff is not true." *See Bisbee*, 186 N.J. Super. at 342, 452 A.2d at 692 ("This tort form of invasion of privacy is analo-

gous to defamation, in that the statement which gives rise to the cause of action must be untrue."); *Cibenko*, 510 F. Supp. at 766.

C. *First Amendment Limitations on False Light Claims*

1. *Such Claims Require Falsity and Requisite Fault*

In order for a plaintiff to succeed on a false light claim without unduly impinging on the First Amendment guarantees of freedom of the press, falsity and the requisite level of fault must be demonstrated. In *Time, Inc. v. Hill*, 385 U.S. at 374, the Supreme Court considered a false light invasion of privacy action involving a New York statute which provided a cause of action to a person whose name or picture was used by another without consent for purposes of trade or advertising. It ruled that "the constitutional protections for speech and press preclude the application of the New York statute to redress *false reports* of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." *Id.* at 387-88 (emphasis added). Because the New York courts had construed the relevant statute to allow truth as a complete defense when the publication involved a matter of public interest, the Court did not address whether the First Amendment would be violated if truth were not a defense to this kind of privacy claim. *Id.* at 383-84. Yet, because the fault standard devised by the Court requires knowledge of or reckless disregard of falsity, the logic seems inescapable that the First Amendment also requires a plaintiff to prove falsity.

Again, in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 248 (1974), the Court addressed a false light

claim in which it was conceded that the offending newspaper article contained a number of false statements and inaccuracies. It stated that the subject article contained " 'calculated *falsehoods*,' and the jury was plainly justified in finding that [a news reporter] had portrayed the Cantrells in a false light through knowing or reckless untruth." *Id.* at 253 (emphasis added). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), it was held that when the plaintiff is a private individual the states could define for themselves the appropriate standard of liability for a publisher of defamatory falsehoods, so long as the states did not impose liability without fault. *Gertz* raised without deciding whether in subsequent cases an actual malice or a negligence standard should be applied in a false light action commenced by a private individual against a media defendant. As in *Cantrell*, the jury here found that the more stringent actual malice standard had been satisfied. We need not decide this issue because, as will be shown, there was no evidence on which a reasonable jury could find that the broadcast portrayed the plaintiff in a false light. It may be that in future privacy cases courts will apply the less stringent "negligence" standard used in defamation cases brought by private figures. *See* Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1274 (1976).

Regardless of the particular fault standard to be applied, it is clear that when publishing or broadcasting a newsworthy matter of public interest a media defendant may not be held liable for the tort of false light invasion of a person's privacy without proof of falsity and some level of fault. *Cf. Philadelphia Newspapers, Inc. v. Hepps*, ____ U.S. ____, 54 U.S.L.W. 4373 (April 21, 1986) (First Amendment requires a plaintiff to prove

falsity in defamation cases. Falsity may never be presumed nor may defendant be required to prove truth.).

2. *Falsity Requirement Safeguards Editorial Freedom*

It is a truism that effective news reporting involves editing and that the editing process obviously entails professional judgment. In this process material that is flattering or critical of a particular person may be included or eliminated. In *Pittsburgh Press Co. v. Human Rel. Comm'n.*, 413 U.S. 376 (1973), the Supreme Court—approving a bar against employment advertising specifying "male" or "female"—emphasized the importance of independent editorial judgment. It prohibited "any restriction whatever, whether of context or layout, on stories or commentary originated by [the newspaper], its columnists, or its contributors." The Court reaffirmed "unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial." *Id.* at 391.

Irving Machleder asserts that CBS deliberately created a false light portrayal of him in order to sensationalize an "otherwise uneventful story." He argues that, in furtherance of this goal, CBS selectively chose those parts of the interview that tended to portray him as intemperate and evasive or as an illegal dumper, and excised those portions that would explain his behavior. For example, Machleder pointed out that CBS cut from the news report his statement, "I don't want to be on television, I'm sorry, I'm sorry," preferring the subsequent more hostile and incriminating statement, "Get that damn camera out of here." He maintains that had the broadcast included the earlier statement, the viewing audience would have understood the later statement to be the result of intimi-

dation and pressure rather than an implied admission of guilt.

Although plaintiff's argument has superficial merit, recovery for a false light tort may not be predicated on a rule that holds a media defendant liable for broadcasting truthful statements and actions because it failed to include additional facts which might have cast the plaintiff in a more favorable or balanced light. To permit recovery in such circumstances violates the First Amendment since "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *see Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 132, 448 A.2d 1317, 1331 (1982). ("As long as the matter published is substantially true, the defendant was conditionally protected from liability for a false light invasion of privacy, regardless of its decision to omit facts that may place the plaintiff under less harsh public scrutiny.").

In *Miami Herald*, the Court examined whether a Florida statute requiring newspapers to grant political candidates equal access to reply to criticism violated the First Amendment. A candidate for the Florida House of Representatives demanded that the Miami Herald print verbatim his replies to two editorials critical of his candidacy. Upon the newspaper's refusal, the candidate brought suit under the Florida statute. The issue was framed in terms of "[c]ompelling editors or publishers to publish that which 'reason' tells them should not be

published . . . . " *Id.* at 256. Acknowledging that a "responsible press is an undoubtedly desirable goal," *id.*, the Supreme Court ruled that "the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.* at 258.

A court cannot substitute its judgment for that of the press by requiring the press to present an article or broadcast in what the court believes is a balanced manner. It may only assess liability when the press so oversteps its editorial freedom that it contains falsity and does so with the requisite degree of fault.

3. *False Light and Defamation are Separate Torts*

Having established that principle, we turn to examine whether any vitality remains in the false light privacy tort when injury to reputation is at stake. Because both the defamation and false light privacy torts share the common elements of publication and falsity, a good deal of overlapping exists between them. But important distinctions remain so that the answer to the question of whether the older tort claim has swallowed whole the newer is "no". Yet, in many cases a successful false light claim might also give rise to liability for defamation. For example, while a false light claim may be defamatory, it need not be. *Cibenko*, 510 F. Supp. at 766; *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081, 1088 (E.D. Pa. 1980); Wade, *Defamation and the Right of Privacy*, 15 Vand. L. Rev. 1093, 1107-08 (1962). Further, false light law makes no distinction between oral or written words as defamation does. Nor is there a distinction in privacy invasion false light cases between slander *per se* and slander requiring proof of special damages. Wade, *supra*, at 1111-12. In addition to these substantive distinctions,

there are procedural differences. For instance, the burden of proof in a defamation case is preponderance of the evidence, while in false light litigation it takes clear and convincing evidence to establish the claim.

IV FALSE LIGHT CLAIM IN THIS CASE

A. *Jury Instructions*

With the above principles in mind we turn to the facts of this case. The first issue to be addressed is whether the news account giving rise to the claim was false. In order to answer this question, we begin by examining the trial court's charge to the jury on defamation and false light, and then scrutinizing the jury verdict sheet.

Irving Machleder alleges that CBS's broadcast was defamatory—depicting him and Flexcraft as being responsible for the illegal dumping. Machleder asserts that the news report did this by certain false statements, such as identifying the dump site as "527 Avenue P," which is Flexcraft's address, and by presenting the information in a manner that would cause a reasonable person to infer—considering the broadcast as a whole—that plaintiffs dumped the hazardous chemical drums on the overgrown adjacent site.

With respect to plaintiff's defamation claim, the district court judge charged the jury:

> For you to award either Irving Machleder or Flexcraft Industries your verdict, you must find that (1) the defendants broadcast a statement of fact that the average viewer would reasonably understand as a defamatory statement about plaintiffs Irving Machleder and/or Flexcraft Industries; (2) that the state-

> ment of fact concerning Irving Machleder and/or Flexcraft Industries was substantially false . . . false in some material respect; and (3) that the report was broadcast with the requisite degree of fault [negligence] . . . .

On its verdict sheet the jury found that though the CBS broadcast contained defamatory statements of fact concerning Irving Machleder, he failed to prove that any of the defamatory statements was substantially false. Based on this finding the district court properly dismissed plaintiff's defamation claim.

In the second count of his complaint Machleder alleges that the May 22, 1979 broadcast cast him in a false light by portraying him as being "intemperate and evasive" or as an illegal dumper of chemical wastes. The district court instructed the jury:

> For you to find for plaintiff Machleder on his false light claim, plaintiff must first establish that the broadcast, viewed as a whole, portrayed him as intemperate and evasive or as an illegal dumper of chemical wastes; and, second, that those portrayals would be highly offensive to a reasonable person.

The court went on to explain that if these two preliminary requirements were met, plaintiff then must establish that such portrayal or portrayals was substantially false. Finally, in order for Machleder to succeed, the court instructed the jury that he must prove by clear and convincing evidence that CBS broadcast the story with actual malice.

The district court charged the jury that "if you find the broadcast portrayed only what was substantially accurate,

the fact that such substantially accurate statements of fact may have embarrassed plaintiff Machleder is not a basis for a verdict for plaintiff Machleder on his 'false light' claim." An examination of the jury verdict sheet[1] reveals a seeming inconsistency. Specifically, the jury found on the false light claim that the plaintiff proved by clear and convincing evidence that he was portrayed in a false light by the broadcast and that the defendants knew that the

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1 A comparison of jury findings on the defamation claim with its findings on the false light claim reveals this.

Findings on Libel Claim

1. Do you find that plaintiff Irving Machleder has proved by a preponderance of the evidence that the May 22, 1979 broadcast would be understood by the average viewer to contain defamatory statements of fact concerning plaintiff Machleder? Yes.
2. Do you find that plaintiff Irving Machleder has proved by a preponderance of the evidence that any defamatory statements of fact concerning him in the May 22, 1979 broadcast were substantially false? No.
4. Do you find that plaintiff Flexcraft Industries, Inc. has proved by a preponderance of the evidence that the May 22, 1979 broadcast would be understood by the average viewer to contain defamatory statements of fact concerning plaintiff Flexcraft? Yes.
5. Do you find that plaintiff Flexcraft Industries has proved by a preponderance of the evidence that any defamatory statements of fact concerning the company in the May 22, 1979 broadcast were substantially false? No.

Findings on False Light Claim

11. Do you find that plaintiff Irving Machleder has proved by clear and convincing evidence that he was portrayed in a false light by the May 22, 1979 broadcast? Yes.
12. Do you find that plaintiff Irving Machleder has proved by clear and convincing evidence that such false light portrayal would be highly offensive to persons of ordinary sensibilities? Yes.
13. Do you find that plaintiff Irving Machleder has proved by clear and convincing evidence that defendants Arnold Diaz and CBS, Inc. knew that the May 22, 1979 broadcast portrayed plaintiff Machleder in a false light highly offensive to persons of ordinary sensibilities or had reckless disregard as to the truth of the portrayal? Yes.

broadcast portrayed him in a false light or had reckless disregard as to the truth of the portrayal. These findings are apparently irreconcilable with the jury's findings on the defamation claim that the defamatory statements of fact were not substantially false. A broadcast cannot cast the plaintiff in a false light unless it is substantially false. *See Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d at 135. The role of the appellate court is to adopt a view of the case—if there is one—that resolves any seeming inconsistency in the jury's verdict. *See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd.*, 369 U.S. 355, 364 (1962); *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 748 (2d Cir. 1984).

There is one theory for reconciling the jury's verdict as to the false light claim and the libel claim. In support of his false light claim, the plaintiff alleged that the broadcast portrayed him as intemperate and evasive *or* as an illegal dumper. In contrast, his defamation claim was based on the allegation that he was portrayed as an illegal dumper. Thus, the jury could have found that the plaintiff was an illegal dumper, but was not, as portrayed, intemperate and evasive.

In reviewing the denial of plaintiff's motion for judgment notwithstanding the verdict, we must view the evidence in the light most favorable to the plaintiff to determine whether the evidence was sufficient to allow a reasonable juror to conclude that there was falsity in the portrayal of the plaintiff as intemperate and evasive. *See Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 951-52 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982).

Here we find that the evidence was insufficient. Any portrayal of plaintiff as intemperate and evasive could

not be false since it was based on his own conduct which was accurately captured by the cameras. Further, the only evidence on plaintiff's temperment came from a business associate who, though he had done business with the plaintiff, saw Machleder only for 15 minutes every three months. This was clearly insufficient evidence to establish that the film showing plaintiff's actions depicted him in a false light. Since proof of falsity was required, and the film footage (virtually unedited except for omission from the interview of plaintiff's statement, "I don't want to be on television, I'm sorry, I'm sorry," according to CBS's uncontroverted allegation) was accurate, the false light claim must fail.

B. *Highly Offenive Standard*

Having found that the district court erred in not granting defendant's judgment notwithstanding the verdict, we discuss briefly whether the published matter was highly offensive to a reasonable person, merely to indicate that a portrayal of this type—even had it been false—would not give rise to liability on a false light claim.

Comment C to the Restatement of Torts § 652E makes clear that "[i]t is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy." *See Devlin v. Greiner*, 147 N.J. Super. 446, 462, 371 A.2d 380, 390 (Law Div. 1977); Prosser, *Privacy*, *supra*, at 396-97.

We hold that the district court that ruled on the motions erred in concluding that the "alleged portrayal of Machleder as intemperate and evasive in response to

Diaz's questions [could not] be deemed inoffensive as a matter of law," *Machleder v. Diaz*, 538 F. Supp. at 1375, and in denying summary judgment on the false light claim on that basis. By the same token, the trial court erred in denying CBS' motions for a directed verdict and judgment notwithstanding the verdict since no reasonable juror could have concluded that the alleged portrayal was highly offensive. Under New Jersey law a court may determine as a matter of law that a publication is "not reasonably capable of conveying the offensive meaning or the innuendo ascribed by plaintiff as the basis for his invasion of privacy claim." *Cibenko*, 510 F. Supp. at 767; *Bisbee*, 186 N.J. Super. 335, 342, 452 A.2d at 692.

In order to avoid a head-on collision with First Amendment rights, courts have narrowly construed the highly offensive standard. A brief review of several cases illustrates that the alleged portrayal of Irving Machleder as intemperate and evasive fails to meet such standard. Those decisions that have found false light portrayals offensive to a reasonable person are considerably more insulting than CBS's portrayal of Irving Machleder. *Cantrell*, 419 U.S. at 247-48 (false portrayal of private individual and her family as destitute exposed them to ridicule and pity); *Time, Inc. v. Hill*, 385 U.S. at 378 (false portrayal of family held hostage, depicting violence and verbal sexual insult); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (unauthorized use of model's nude photograph in Hustler Magazine falsely portrayed her as a lesbian and willing to be associated with Hustler magazine). Again, courts have declined to recognize portrayals as highly offensive in cases more egregious than Machleder's. *See Virgil v. Sports Illustrated*, 424 F. Supp. 1286, 1289 (S.D. Cal. 1976) (article

reporting plaintiff's exploits, including putting out cigarettes in his mouth, diving off stairs to impress women, hurting himself in order to qualify for unemployment insurance so as to have time for body surfing, and participating in gang fights and eating insects was not offensive enough to preclude being considered newsworthy); *Arrington v. NY Times Co.*, 55 N.Y.2d 433, 441-42, 449 N.Y.S.2d 941 (1982) (even if New York were to recognize a false light claim, unauthorized use of private individual's photograph to illustrate " 'materialistic, status-conscious' " black middle class, does not measure up to the highly offensive standard).

V CROSS APPEALS

Machleder cross-appeals from the district court's dismissal of his invasion of privacy claim on the theory of improper publicity given to private facts and Flexcraft cross-appeals the dismissal of its trespass claim. Both of these appeals are without merit. We examine the publication of private facts claim first.

The definition of this theory of liability for invasion of privacy is set forth in the Restatement (Second) of Torts § 652D.

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

The district court dismissed this claim because the encounter between Diaz and Machleder "took place in a

semi-public area while plaintiff knew the cameras were rolling. Defendant is subject to no liability for giving further publicity to that which plaintiff leaves open to the public eye." *Machleder v. Diaz*, 538 F. Supp. at 1374 (citing Restatement (Second) Torts, § 652D, Comment b). Thus, for this reason, and because the published matter was not highly offensive, this claim was properly dismissed.

Second, plaintiffs assert that the district court erred when it granted summary judgment dismissing the trespass claim. Diaz and the camera crew entered the Flexcraft premises peacefully; there were no signs warning them to keep off the property. Neither of the Machleders asked Diaz and his crew to leave. *See Martin v. Struthers*, 319 U.S. 141, 147 (1943) ("Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off"); Cooley, *On Torts*, § 248 at 239 (one may visit another's place of business without incurring liability, unless he is warned away by placard or otherwise.); *Snyder v. I. Jay Realty Co.*, 30 N.J. 303, 153 A.2d 1 (1959) (guests of factory employees were not trespassers where factory owner had not posted sign).

When Diaz met Bruce Machleder at the side door of the Flexcraft plant, Machleder told him to go around to the front office. This express invitation to come on to the property converted Diaz' status to that of invitee. Even if only a licensee, Diaz was certainly not a trespasser. Restatement (Second) of Torts § 332, comment b. Although Irving Machleder expressed anger at being filmed and questioned, this did not negate consent. Hence, the district court correctly dismissed the trespass claim.

VI CONCLUSION

Because the jury found in plaintiff's libel action that the defamatory statements, i.e., of illegal dumping, were not substantially false, the illegal dumping portrayal will not support a false light verdict. As a matter of law, we conclude that the portrayal of Irving Machleder as intemperate and evasive is not false and is not highly offensive to a reasonable person. Thus, on either ground a finding of liability for false light invasion of privacy must be reversed and the action dismissed. Reversing the false light verdict also makes unnecessary an examination of defendant's other related challenges.

The judgment of the district court awarding compensatory and punitive damages for a false light invasion of privacy is reversed and plaintiff's complaint dismissed. The dismissal by the district court of the causes of action for improper publicity given to private facts and for trespass is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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79 Civ. 4373 (PKL)

IRVING MACHLEDER and
FLEXCRAFT INDUSTRIES, INC.,

Plaintiffs,

– against –

ARNOLD DIAZ, CBS INC., WCBS-TV,
ANN SORKOWITZ, FRANK PIVALO,
THOMAS GALLAGHER and DENNIS P. COYNE,

Defendants.

DECISION

LEISURE, *District Judge:*

The complaint in this diversity action asserted claims for compensatory and punitive damages for libel, slander, invasion of privacy, trespass and assault and battery. The claims arose out of the May 22, 1979 broadcast by WCBS-TV of a report about the dumping of chemical wastes on a certain lot adjacent to Avenue P in Newark, New Jersey. The report was prepared by Arnold Diaz, the station's New Jersey reporter.

Applying New Jersey law, Judge Duffy dismissed two of the three invasion of privacy claims and the trespass clain. upon defendants' summary judgment motion. *Machleder v. Diaz*, 538 F. Supp. 1364 (S.D.N.Y. 1982). Pursuant to defendants' application, the trial of this case was bifurcated between the issues of liability and damages. After the close of evidence on the liability issues, the Court granted defendants' motion to dismiss the assault and battery claims pursuant to Fed. R. Civ. P. 50(a). Following the completion of the trial on both the liability and damages issues, the jury returned a verdict in favor of all defendants on the libel and slander claims but with respect to plaintiff Irving Machleder's false light invasion of privacy claim, it awarded him $250,000 in compensatory damages and $1,000,000 in punitive damages against defendant CBS, Inc. ("CBS") only.

CBS has now moved for an order granting judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b), or in the alternative, an order granting a new trial under Rule 59(b). Plaintiffs have cross-moved under Fed. R. Civ. P. 11, 16(f), 26(g), 37(b)(2)(D) and 56(g) for an order imposing sanctions and reasonable costs and attorney's fees against CBS and its counsel in connection with the discovery of the videotape of the on-air broadcast of the May 22, 1979 report, and the affidavit signed by Mr. Diaz and submitted to the Court in connection with defendants' summary judgment motion.

Defendant's P st-Trial Motions

Six of the arguments raised by CBS in support of its post-trial motions were the basis for objections raised unsuccessfully at

trial.[1] The six arguments, summarized in the margin, are hereby denied for the reasons previously stated by the Court on the record during the trial, with the exception of the argument that plaintiff can recover punitive damages only if he proves common law malice. That subject is treated more fully below.

The thrust of CBS's post-trial motions is directed to the jury's damage awards. CBS alleges that these awards have no foundation in the law or under the facts of this case. More specifically, CBS argues that there was insufficient evidence from which the jury

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[1] In addition to preserving objections previously made as to evidence which it contends was admitted incorrectly and the sufficiency of proof offered at trial, as well as objections to portions of the Court's jury instructions, CBS reiterated the following specific arguments:

> 1. The admission into evidence of a redacted transcript of "Watching the Watchdog" was erroneous and rendered the trial fundamentally unfair.
>
> 2. The jury's finding of no falsity with respect to plaintiffs' libel claim renders the proof of Mr. Machleder's false light invasion of privacy claim insufficient as a matter of law.
>
> 3. The lack of falsity in the broadcast renders Mr. Machleder's false light invasion of privacy claim insufficient as a matter of law.
>
> 4. Mr. Machleder's proof under his false light invasion of privacy claim falls below that required to establish *New York Times* actual malice.
>
> 5. Mr. Machleder's punitive damages claim should not have been submitted to the jury because there was no proof supporting a finding of common law malice.
>
> 6. The Court's failure to instruct the jury that there is no right to avoid being filmed or appearing on television was prejudicial to CBS in light of the manner in which plaintiffs' presented their case at trial.

Memorandum of Law in Support of Post-Verdict Motions by Defendant CBS Inc., at 1-3.

could determine that Mr. Machleder suffered actual injury as a result of the May 22, 1979 broadcast. Next, assuming that plaintiff Machleder[2] proved actual injury, CBS contends that the amount of the award is excessive. Finally, CBS argues that the punitive damages award is unsupported by the record and is grossly excessive.

Compensatory Damages

The standard for determining whether to grant a motion for judgment notwithstanding the verdict was set forth by the Second Circuit in *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163 (2d Cir. 1980).

> [T]he trial court should grant a judgment n.o.v. only when (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.

Id. at 168. *See also Ebker v. Tan Jay International, Ltd.*, 739 F.2d 812, 825 (2d Cir. 1984).

In cases such as this where First Amendment considerations apply, the Supreme Court requires that "compensatory awards 'be supported by competent evidence concerning the injury.' " *Time, Inc. v. Firestone*, 424 U.S. 448, 459, 96 S.Ct. 958, 968, 47 L.Ed 2d 154 (1976) quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 3012, 41 L.Ed. 2d 789 (1974). Under New Jersey law, a plaintiff may recover compensatory damages "if he has met his burden of proving that he has suffered some loss or injury and if he has given the jury some information from which to estimate the amount of damages . . . . " *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 477 A.2d 1224, 1226 n.1 (1984).

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[2] For the sake of convenience, Mr. Machleder is hereinafter referred to as "plaintiff," in the singular.

The false light invasion of privacy tort "is designed to compensate for falsehoods that injure feelings rather than reputation." Sack, *Libel, Slander and Related Problems*, 393 (1980). "The injury is mental and subjective. It impairs the mental peace and comfort of the person and may cause suffering much more acute that that caused by bodily injury." *Clark v. Celeb Publishing, Inc.*, 530 F. Supp. 979, 983 (S.D.N.Y. 1981) (California law) (quotation omitted).

CBS argues that the trial transcript is devoid of evidence supporting the jury's compensatory damage award. After describing encounters with five people who told him that they had seen the broadcast, the following question was asked of Mr. Machleder and he gave the following answer:

> Q: How did you feel when these people mentioned the broadcast to you?
>
> A: Terribly embarrassed, terribly hurt.

Trial Transcript at 1131-32. CBS contends that this testimony constitutes the only evidence presented by plaintiff which describes the mental anguish he suffered as a result of the broadcast and does not amount to adequate proof of injury to feelings. *See, e.g., Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 141 (2d Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 2114, 85 L.Ed. 2d 479 (1985); *Reveley v. Berg Publications, Inc.*, 601 F. Supp. 44, 46 (W.D. Tex. 1984); *Nekolny v. Painter*, 653 F.2d 1164, 1172-73 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021, 102 S. Ct. 1719, 72 L.Ed. 2d 139 (1982); *Nellis v. Miller*, 101 A.D.2d 1002, 477 N.Y.S.2d 72, 73 (4th Dep't), *appeal dismissed*, 63 N.Y.2d 952 (1984). In other words, CBS contends that plaintiff has offered no evidence of the nature, duration or seriousness of his mental anguish nor what effect, if any, the broadcast had on the quality of his life. *See, Bullard v. Central Vermont Ry.*, 565 F.2d 193, 197 (1st Cir. 1977). Consequently, the compensatory award must have been based on "conjecture, speculation, surmise or guess." *Knapp v. Phillips Petroleum Co.*, 123 N.J. Super. 26, 31, 301 A.2d 451, 453 (App. Div.), *certif. denied*, 63 N.J. 503, 308 A.2d 668 (1973).

The argument that the exchange quoted above is the only evidence of plaintiff's hurt feelings is misleading. CBS ignores plaintiff's testimony about his apprehension that the broadcast would portray him as an illegal dumper, his frantic efforts to prevent the New Jersey footage from being broadcast and his concern that the story would damage the careers of his sons who worked in the chemical industry. In addition, it is self-evident from a viewing of the broadcast tape itself that Mr. Machleder was very upset at even the suggestion that he was somehow responsible for the barrels strewn about the lot next to the Flexcraft Industries, Inc. factory. Further, the CBS legal counsel who spoke to Mr. Machleder when plaintiff asked that the report not be broadcast testified that plaintiff was "rather agitated" at that time. While it is true that some of this testimony related to events which occurred before the report was broadcast, there is no evidence in the record to indicate that Mr. Machleder's mental state improved after the broadcast. Indeed, it is a fair inference that his fears, apprehension and anguish intensified once people started telling him that they had seen the report, as reflected in his testimony at trial.

More important, however, CBS has ignored the demeanor aspect of Mr. Machleder's testimony. The testimony that is coldly recorded in the trial transcript is stripped of the dramatic emotional manner in which it was delivered. Plaintiff's testimony was emotion-filled and more than once his voice wavered and he broke into tears. This aspect of his testimony undoubtedly impressed the jury and certainly impressed the Court that defendant's broadcast had had a genuine and profound impact on Mr. Machleder's mental condition. The fact that his torment has persisted over the intervening six years is evidence of the depth and scope of his hurt feelings.

CBS has cited several cases for the proposition that substantial compensatory awards for mental distress are improper where the only evidence is subjective. This argument is unavailing, not only because there was objective evidence to prove plaintiff's injuries, but plaintiff's conduct was competent evidence to prove such damage. "Although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others." *Carey v. Piphus*, 435 U.S. 247, 264 n.20, 98 S.Ct. 1042, 1052 n.20,

55 L.Ed. 2d 252 (1978). The jury's ability "to hear and see the witnesses and to have the 'feel' of the case" is a significant factor for the Court to consider on this motion. *Cf. State v. Johnson*, 42 N.J. 146, 199 A.2d 809, 817 (1964). In addition, evidence that plaintiff had anxiety over the effect the broadcast might have on his sons is "competent evidence . . . to permit the jury to assess the amount of injury." *Time, Inc. v. Firestone*, 424 U.S. 448, 460-61, 96 S.Ct. 958, 968-69, 47 L.Ed. 2d 154 (1976) (plaintiff testified that she feared her son would be adversely affected by the story). Moreover, medical evidence is not required to demonstrate mental anguish sufficient to permit the recovery of damages. *Cf. Wiskotoni v. Michigan National Bank-West*, 716 F.2d 378, 389 (6th Cir. 1983); *Burnett v. National Enquirer, Inc.*, 7 Media L. Rep. (BNA) 1321, 1323 (Cal. Super. 1981), *aff'd in relevant part*, 144 Cal.App.3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, ____ U.S. ____, 104 S. Ct. 1260, 79 L.Ed. 2d 668 (1984).

CBS has failed to demonstrate that the jury's verdict could only have been the result of "sheer surmise and conjecture" or that there was such overwhelming evidence in favor of CBS that reasonable men could not arrive at a verdict against CBS. *Mattivi*, 618 F.2d at 168. Defendant's motion to set aside the verdict or for a new trial on the basis that plaintiff failed to prove that he suffered actual injury is denied.

CBS argues next that, even assuming plaintiff has proved an actual injury, the jury's compensatory award was grossly excessive. On such a motion, the Court should not disturb the jury's damages verdict unless there is reason to believe the verdict was the result of passion, bias or prejudice or that it is so excessive or shocking to the court's conscience "that it would be a denial of justice to permit it to stand." *Mileski v. Long Island Railroad Co.*, 499 F.2d 1169, 1173 (2d Cir. 1974); *Morgan v. Consolidated Rail Corp.*, 509 F. Supp. 281, 286 (S.D.N.Y. 1980); *Bevevino v. Saydjari*, 76 F.R.D. 88, 94-95 (S.D.N.Y. 1977), *aff'd*, 574 F.2d 676 (2d Cir. 1978).

The first criterion is not met here. There is no indication the jury acted out of prejudice or passion. First, the trial was bifurcated so the jury would deliberate on the issues of liability and damages separately. The jury deliberated three days on the liability issues and devoted an additional half-day to the damages deliberations.

It requested and received copies of selected portions of the trial transcript and received a copy of the Court's instructions on liability and damages. The jury rejected two of the theories of liability alleged by plaintiffs. The jury's conduct in this regard demonstrates that it carefully and deliberately followed the Court's instructions and was not influenced by passion or prejudice. *Porss v. Maritime Overseas Corp.*, 531 F.2d 667, 669 (2d Cir. 1976) (testimony read and two of plaintiff's claims rejected); *La France v. New York, New Haven & Hartford Railroad Co.*, 191 F. Supp. 164 (D. Conn.), *aff'd*, 292 F.2d 649 (2d Cir. 1961).

When considering a claim of excessive damages the Court must accord the jury's verdict "substantial deference." *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 750 (2d Cir. 1984). In order to determine whether an award is so excessive as to shock the judicial conscience, the Court should look to other cases involving awards for mental anguish which were reviewed by higher courts. *Id.* CBS has referred the Court to several decisions where compensatory damage awards in excess of $50,000 were reduced by means of remittitur or reversed altogether.[3]

A review of these cases, while they do make the Court aware of judicial attitudes in general, "is not particularly helpful since the facts of each case vary significantly." *Burnett v. National Enquirer*, 7 Med. L. Rep. (BNA) at 1323. *See also Dagnello v. Long Island Railroad*, 193 F. Supp. 552, 554 (S.D.N.Y. 1960) (Weinfeld, J.) (review of cases "emphasize[s] contrariety of individual views"), *aff'd*, 289 F.2d 797 (2d Cir. 1961). In addition, there are cases

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[3] *Pirre v. Printing Develop., Inc.*, 468 F. Supp. 1028, 1038 (S.D.N.Y.), *aff'd*, 614 F.2d 1290 (2d Cir. 1979) ($325,000 jury award reduced to $45,000); *Nellis v. Miller*, 101 A.D.2d 1002, 477 N.Y.S.2d 72, 73 (4th Dep't), *appeal dismissed*, 63 N.Y.2d 952 (1984) ($150,000 jury award reduced to $5,000); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 141 (2d Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S. Ct. 2114, 85 L.Ed. 2d 479 (1985) ($7,000,000 jury award reversed); *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337, 347 (1983) ($675,000 jury award reduced to $50,000); *Burnett v. Nat'l Enquirer, Inc.*, 7 Media L. Rep. (BNA) 1321, 1323-24 (Cal. Super. 1981) ($300,000 jury award reduced to $50,000), *aff'd in relevant part*, 144 Cal.App.3d 991, 1016, 193 Cal. Reptr. 206, 222 (1983), *appeal dismissed*, ___ U.S. ___, 104 S. Ct. 1260, 79 L.Ed. 2d 668 (1984); *Douglass v. Hustler Mag., Inc.*, 769 F.2d 1128, 1144-45 (7th Cir. 1985) ($300,000 jury award reversed).

where jury verdicts in excess of $50,000 have been left undisturbed. *Time, Inc. v. Firestone,* 424 U.S. at 460-61, 96 S. Ct. at 968-69 ($100,000 jury award); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1093-94 (5th Cir. 1984) ($150,000 jury award for false light invasion of privacy), *cert. denied,* ____ U.S. ____, 105 S. Ct. 783, 83 L.Ed. 777 (1985); *cf. Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363, 1372 (N.D. Cal. 1977) ($350,000 jury award based in part upon plaintiff's uncontradicted testimony "to the apprehension and severe mental and emotional distress . . . caused"), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102, 101 S.Ct. 897, 66 L.Ed. 2d 827 (1981). Based upon a careful review of these cases and those cited by CBS, as well as the facts and circumstances of this case, the jury's compensatory damages award of $250,000 is neither excessive nor outrageous. CBS' motion to reduce the jury's compensatory damage verdict is denied.

Punitive Damages

CBS asks the Court to set aside the punitive damage verdict because the amount of the award is so excessive that it shocks the judicial conscience. In addition, CBS has renewed its motion that plaintiff is not entitled to a punitive damage award because he failed to prove that CBS acted with spite or ill will.

Common Law or Actual Malice?

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50, 94 S.Ct. 2997, 3011-12, 41 L.Ed. 2d 789 (1974), the Supreme Court held that that the First Amendment prohibited punitive damage awards against the publisher of a libel that involved a matter of public concern unless plaintiff proved "actual malice," that is knowledge of falsity or reckless disregard for the truth. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ____ U.S. ____, 105 S. Ct. 2939, 2941, 86 L.Ed. 2d 593 (1985). Although the *Gertz* decision did not bar states from imposing further restrictions on the imposition of punitive damages, most state and federal courts have adopted the actual malice standard as the only requirement in this regard for a punitive damage award. Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 847, 854 & n.42 (1985). *See, e.g., Goldwater v. Ginzburg*, 414 F.2d 324, 343 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed. 2d 695 (1970). Defendant's argument in this regard raises the question whether under New Jersey

law proof of *New York Times* actual malice will support an award of punitive damages or whether plaintiff also must separately prove common law malice.[4]

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[4] Over plaintiffs' objection, the jury in this case was instructed to apply the *New York Times* actual malice standard to the issue of liability for false light invasion of privacy. This instruction was based on the authority of two opinions of the Supreme Court in *Times, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed. 2d 456 (1967) and *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed. 2d 419 (1974). In *Time, Inc. v. Hill*, a false light invasion of privacy action, the Court held that in order to establish liability plaintiff had to prove publication with knowledge of falsity or with reckless disregard of the truth. 385 U.S. at 388, 87 S. Ct. at 542. In *Cantrell*, also a false light invasion of privacy action, the Court declined "to consider whether a State may constitutionally apply a more relaxed standard of liability" in a false light invasion of privacy action brought by a private figure or "whether the constitutional standard announced in *Time, Inc. v. Hill*, applies to all false-light cases." 419 U.S. at 250-51, 95 S.Ct. at 469-70 citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974). *See* Restatement (Second) of Torts § 652E comment d, at 398-99 (1977). Several courts have applied a negligence standard in actions involving a private figure plaintiff. *Wood v. Hustler Mag., Inc.*, 736 F.2d 1084 (5th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 783, 83 L.Ed. 2d 777 (1985); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1288 (D.D.C. 1981); *Fitzgerald v. Penthouse Int'l., Ltd.*, 639 F.2d 1076, 1080 (4th Cir.), *on remand*, 525 F. Supp. 585, 602-03 (D. Md. 1981), *aff'd in relevant part*, 691 F.2d 666 (1982), *cert. denied*, 460 U.S. 1024, 103 S.Ct. 1277, 75 L.Ed. 2d 497 (1983); *Uhl v. Columbia Broadcasting Systems, Inc.*, 476 F. Supp. 1134, 1139-41 (W.D. Pa. 1979); *Rinsley v. Brandt*, 446 F. Supp. 850, 856 (D. Kan. 1977). One New Jersey intermediate appellate court has hinted that in a non-media case with a private figure plaintiff it may be appropriate to prove liability on a negligence standard. *Devlin v. Greiner*, 147 N.J. Super. 446, 371 A.2d 380 389 n.4 (Law Div. 1977). Also, one court has suggested that because the same considerations apply to claims for defamation and false light invasion of privacy, when both torts are alleged in one case, the same standard of fault should apply to both torts. *Cibenko v. Worth Pub. Inc.*, 510 F. Supp. 761, 766 (D.N.J. 1981). *See also* Hill, *Defamation and Privacy Under The First Amendment*, 76 Col. L. Rev. 1205, 1274 & n.321 (1976). Notwithstanding these considerations, in the absence of an explicit ruling on this issue by either the United States Supreme Court or the New Jersey Supreme Court, it is this Court's determination that the actual malice standard of liability applies to the false light invasion of privacy claim in this action. *Accord McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 888 (Ky. 1981), *cert. denied*, 456 U.S. 975, 102 S.Ct. 2239, 72 L.Ed. 2d 849 (1982); *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840, & n.9 (1979), *cert. denied*, 444 U.S. 1076, 100 S.Ct. 1024, 62 L.Ed. 2d 759 (1980).

Constitutional "actual malice" and common law malice address different concerns. In *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376, *cert. denied*, 459 U.S. 907, 103 S.Ct. 211, 74 L.Ed. 2d 169 (1982), the New Jersey Supreme Court stated that " 'actual malice' does not mean that "the defamatory falsehood was published with ill will, but rather that the statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.' " 445 A.2d at 388 quoting *New York Times Co. v. Sullivan*, 376 U.S. 254 at 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed. 2d 686.

New Jersey statutory law provides that in a libel action against a New Jersey media defendant, a plaintiff may recover punitive damages only if he proves either malice in fact or that, in the face of a written demand, the defendant refused to publish a retraction within a reasonable time. N.J. Stat. Ann. § 2A-43-2 (West 1952 & Supp. 1985). In this regard, the parties stipulated that plaintiffs demanded a retraction in writing and that defendants did not retract as requested in the letter. On this basis alone, the evidence established one of the elements under New Jersey law entitling a libel plaintiff suing a media defendant to recover punitive damages. It is not clear to the Court, however, whether this statute applies in this case. Neither party has referred to it and application of the statute by its terms is limited to libel actions against New Jersey defendants. It does not on its face appear to apply to false light invasion of privacy claims. But, there are other reasons to hold that plaintiff was entitled to have the jury consider the punitive damages issue.

It is true, as CBS argues, that under some circumstances New Jersey courts have required a plaintiff seeking punitive damages in a libel case to prove some type of spite or ill will. *See, e.g., Marchiano v. Sandman*, 178 N.J. Super. 171, 428 A.2d 541, 543 (App. Div.), *certif. denied*, 87 N.J. 392, 434 A.2d 1073 (1981); *Sisler v. Courier-News Co.*, 199 N.J. Super. 307, 489 A.2d 704, 715 (App. Div. 1985) (negligence standard applied in private figure libel suit). But other decisions indicate that in libel cases an evil motive is not an absolute requirement. For example, in *Bock v. Plainfield Courier-News*, 45 N.J. Super. 302, 132 A.2d 523 (App. Div. 1957) the court held that a plaintiff may be entitled to punitive damages

"though the proof fails to disclose a designedly evil intent, it suggests a calculated disregard of the consequences." 132 A.2d at 529.

The language used by New Jersey courts to define the type of conduct that would justify an award of punitive damages lends credence to the argument that knowing or reckless falsity may encompass elements of ill will. *See e.g.*, Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1441 (1975) (hereinafter "Eaton") ("Publication of a known lie or publication with a high degree of awareness of probable falsity does seem to carry all the indicia of a bad attitude toward the plaintiff's reputational interest."). In *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 477 A.2d 1224 (1984), the New Jersey Supreme Court decided whether punitive damages may be awarded in the absence of a compensatory damage award in an action for legal fraud. *Id.* at 1226. The court reviewed the New Jersey law concerning punitive damages and concluded that "punitive damages could be awarded for egregious conduct in the absence of compensatory damages." *Id.* at 1231. The court began its analysis by stating that punitive damages may be awarded if the defendant's conduct was "wantonly reckless or malicious." The court defined those terms in several different ways. It stated that plaintiff must show there was "a wanton and wilful disregard of the rights of another," *id.* at 1230, that "there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences," *id.*, or "such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton." *Id.* at 1231 (quotation omitted).

The United State Supreme Court's use of the term "actual malice" has spawned confusion among state courts attempting to reconcile common law definitions of malice with federal constitutional requirements. *See* Eaton, 61 Va. L. Rev. at 1371. This situation has led the New Jersey Supreme Court to observe "that superimposing the federal standard on existing state standards would add one more complexity to the 'confusion of libel and slander law.' " *Burke v. Deiner*, 97 N.J. 465, 479 A.2d 393, 399 (1984) (citation omitted). As a consequence, the court adopted the

New York Times actual malice standard to determine whether the qualified immunity that attaches to official speech applied, 479 A.2d at 399.

In addition, because the jury had awarded plaintiff punitive damages, the Court was constrained to hold further that "[t]he jury should be instructed to use this [knowledge of falsity or reckless disregard for the truth] standard as well to assess punitive damages." *Id.* at 400. n.2. This determination was based on United States Supreme Court cases that had "uniformly emphasized that the jury is not to look for evidence of spite or ill will to judge the actor's speech." *Id.* at 399.

The central issue in *Burke v. Deiner* was whether government officials had a privilege with respect to an allegedly defamatory official statement. The case did not involve a false light invasion of privacy claim by a private party against a media defendant. Nevertheless, when the Court stated that the jury should be instructed to use the actual malice standard to assess punitive damages, it cited as authority *Embrey v. Holly*, 293 Md. 128, 442 A.2d 966, 972 n. 14 (1982) and *Davis v. Schuchat*, 510 F.2d 731, 737 (D.C. Cir. 1975), two actions brought by private persons against media defendants. The Court's reference to these cases, coupled with its discussion of the confusion attendant to superimposing federal standards on state standards, leads me to conclude that the New Jersey Supreme Court would require the jury to apply the actual malice standard when assessing punitive damages in a case such as this. I therefore hold that in this case, having found that CBS acted with actual malice, the jury properly considered the issue of punitive damages.

Was the Award Excessive?

In reviewing the award of $1,000,000 for punitive damages, the Court must consider the circumstances surrounding the broadcast, the nature of the wrongdoing, the extent of the harm inflicted, the intent behind defendant's acts, defendant's wealth, "as well as any mitigating circumstances which may operate to reduce the amount of the damages." *Nappe*, 477 A.2d at 1231. New Jersey law does not

require that the amount of punitve damages bear a fixed proportional relationship to the amount of actual damages. *Id.*

The evidence before the Court supports a substantial award of punitive damages. Defendant's conduct was shown to be callous and indifferent to the rights of plaintiff. CBS employees deliberately decided to broadcast the film of Mr. Machleder, despite a lack of evidence that he was responsible for the abandoned drums and despite knowledge that he had in fact reported their presence to local government agencies two years earlier. The evidence suggested the film was used in order to lend some excitement to an otherwise uneventful story. Serious questions existed whether plaintiff's reaction to the reporter and film crew was newsworthy.

One purpose of a punitive damages award is to deter future conduct of a similar nature. *See, Brink's Inc. v. City of New York*, 546 F. Supp. 403, 413 (S.D.N.Y. 1982) (Weinfeld, J.), *aff'd*, 717 F.2d 700 (2d Cir. 1983). The evidence presented about the attitude of CBS employees toward the handling of the broadcast indicates there is a likelihood that such activity will be repeated as part of a business policy. *See, e.g., Curtis Publishing Co. v. Butts*,388 U.S. 130, 159-61, 87 S.Ct. 1975, 1993-95, 18 L.Ed. 2d 1094 (1967); *Le Mistral, Inc. v. Columbia Broadcasting System*, 61 A.D.2d 491, 402 N.Y.S.2d 815 (1st Dep't 1978).

Although there was no evidence presented to the jury proving the wealth possesssed by CBS, paragraph three of the complaint alleged that in 1978 CBS had gross revenue in excess of $3 billion and net income in excess of $198 million. An award of $1,000,000 is an amount sufficient to "smart" and serve as notice to others that the type of practices at issue in this matter are not condoned by the community. CBS has argued in support of mitigation that it provided a public service by publicizing the hazard which existed and caused the drums to be disposed of properly. While these are certainly important factors in support of mitigation which could operate to reduce the amount of damages, these arguments were presented to the jury and necessarily considered by it in fixing the amount of the punitive damages award. I will not disturb the jury's verdict in this regard. The motion for judgment notwithstanding the verdict and for a new trial is denied.

Plaintiffs' Motion for Sanctions

Plaintiffs base their motion for sanctions on two incidents. The first involved their attempts to obtain a copy of the videotape of the May 22, 1979 broadcast with studio comments. The second involves the affidavit signed by Mr. Diaz and submitted to the Court in connection with defendants' summary judgment motion.

The Videotape With Studio Comments

Plaintiffs' First Request for Production of Documents, dated October 16, 1979, requested all documents relating to the Diaz report as actually broadcast on May 22, 1979. Defendants did not object to the terms of plaintiffs' document request and they agreed to produce for plaintiffs' inspection all documents that related to the Diaz report. However, the videotape of the complete on-air Diaz report with studio comments was not produced to plaintiffs' counsel for inspection.

By letter dated November 28, 1979, plaintiffs' counsel informed defendants' counsel that the recitation of the broadcast dialogue in paragraph 34 of the complaint was reproduced from a transcript that CBS had supplied to him. That transcript apparently had been prepared by an outside contractor hired by CBS. In response, Coudert Brothers advised plaintiffs' counsel that the video tape of the complete on-air broadcast with studio remarks did not exist.

Plaintiffs' Supplemental Request for Production, dated December 19, 1980, repeated verbatim the document request which encompassed the complete on-air broadcast. The videotape in question was not produced pursuant to the supplemental request. At the deposition of Irving Machleder, defendants' counsel represented to plaintiff's counsel that " all of the film that CBS had available of that incident, whether used or not . . . were supplied to you."

The Joint Pretrial Order, so ordered by Judge Duffy on July 30, 1982, provided with regard to trial exhibits that the parties shall exchange documents which they reasonably anticipate to offer into evidence no later than 20 days prior to trial. On the morning of trial

on May 9, 1985, after the jury had been selected and before opening statements were to begin, defendants' counsel notified plaintiffs' counsel that they intended to offer into evidence a videotape of the on-air report, complete with studio comments by Jim Jensen and Mr. Diaz. When plaintiffs' counsel objected and reserved the right to apply to the Court for sanctions at the end of trial, defendants' counsel explained in response that there was an "innocent explanation" for why the videotape had not been delivered earlier.[5]

In opposition to plaintiffs' motion for sanctions, defendants argue that the delay in production of the complete studio videotape did not prejudice plaintiffs because defendants produced an accurate transcript of the entire broadcast, including studio remarks, in response to plaintiff's initial discovery request. In addition, it is argued that defendants and their counsel acted in good faith at all times. The broadcast tape was not produced because it had been removed from the CBS Broadcast Center in late October, 1979 by someone in the employ of Coudert Brothers and inadvertantly misplaced. Once the tape was recovered by Coudert Brothers on May 3, 1985, it was immediately delivered to plaintiffs' counsel. This good faith, coupled with plaintiffs' failure to demonstrate any prejudice is, they argue, fatal to plaintiffs' motion for sanctions. In addition, defendants did not violate the terms of the Pretrial Order since they could not have anticipated use of the tape if they did not realize the tape existed.

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[5] On February 19, 1981, plaintiffs moved before Magistrate Joel J. Tyler for an order compelling discovery in connection with defendants' failure to produce the original film footage and soundtrack made on May 22, 1979. Plaintiffs' counsel had discovered that portions of the filmed out-takes had not been delivered by defendants. By Order dated April 22, 1981, Magistrate Tyler directed that defendants produce an exact and complete copy of the footage taken on May 22, 1979 to plaintiffs. Apparently, defendants had attributed their "continued failure" to adhere to Magistrate Tyler's prior orders to an "unfortunate series of mishaps" or a "circus of innocent errors". Magistrate Tyler stated "[w]hat [defendants' conduct] does demonstrate to this court is a marked lack of care, a violation of prior commitments and a cause of unneccessary effort and expenditure of time by Machleder and this busy court." Magistrate Tyler advised defendants' counsel that unless the documents were delivered as directed, sanctions, including costs and attorney's fees would be imposed upon defendants or their attorneys.

Defendants' explanation is unsatisfactory for two reasons. First, it is not at all clear to the Court that plaintiffs did not suffer prejudice as a result of defendants' belated delivery of the tape. The claims in this case arose out of a television broadcast. Essential to plaintiffs' claims was the reaction the broadcast of the report would provoke in a viewer. Without a videotape of the complete broadcast, it would have been difficult for plaintiffs to gauge the impact the broadcast would have on an audience of disinterested parties. This handicap must have affected plaintiffs' efforts in preparing for the trial of this case.

Second, on March 6, 1985, the videotape in question was submitted to the Court as an exhibit to defendants' *in limine* motion to be relieved from certain of Judge Duffy's prior rulings in the case. Exhibit B to that motion, described as "Outtakes and 5/22/79 Broadcast", is a videotape of the entire broadcast including studio comments and is identical to the videotape delivered to plaintiffs' counsel on or before May 9, 1985 and shown to the jury during opening statements by counsel. Defendants' claim that the videotape was first recovered on May 3, 1985 is refuted by their very own submission dated March 6, 1985. Defendants may claim that there is indeed a further "innocent explanation" for the evident confusion on their part, but whatever it may be leaves the Court with little choice in this instance.

As Magistrate Tyler observed in the context of a previous motion by plaintiffs' in connection with defendants' failure to deliver copies of film footage, defendants' conduct in this regard "demonstrate[s] to this court a marked lack of care . . . and a cause of unneccessary effort and expenditure of time." Accordingly, plaintiffs' motion for sanctions pursuant to Fed. R. Civ. P. 16(f) and 37(b)(2)(D) is granted. Defendant CBS shall compensate plaintiffs for the reasonable costs and attorney's fees incurred in attempting to obtain a copy of the videotape after defendants' counsel first represented that it did not exist, including the costs of bringing this portion of the motion. Plaintiffs are directed to submit to the Court, within fifteen days of receipt of a copy of this decision, an accounting in sworn form, itemizing costs, hours worked by each attorney and the regular hourly fee charged for such work. Any objection as

to the propriety of the amount of such expenses shall be made in writing to the Court within five days after receipt of such accounting, with answering papers to be served within two days after receipt of such objection.

The Diaz Affidavit

Plaintiffs' motion for sanctions under Fed R. Civ. P. 11 and 56(g) is based upon the testimony of Mr. Diaz during trial with regard to an affidavit he signed and that defendants submitted in support of their summary judgment motion. On May 10, 1985, when the affidavit was first shown to Mr. Diaz on direct examination he did not recall having read it before. Mr. Diaz testified that he remembered signing it but stated it was not prepared by him. The basis for this testimony was that certain of the statements in the affidavit were incorrect. Mr. Diaz did not recall having had a conversation with his attorney before the affidavit was prepared. He claimed to have never received a copy of the affidavit before he signed it and did not know the purpose for which it would be used. Mr. Diaz admitted that he signed the affidavit although he disagreed with some of the facts it disclosed. In addition, he had never seen the diagram attached as Exhibit A to the affidavit nor the affidavit of Stephen Cohen, to which the Diaz Affidavit specifically referred. Based upon this testimony, plaintiffs contend that the Diaz Affidavit was that of his attorney, not his own.

On May 13, 1985, defendants' counsel produced to plaintiffs' counsel a draft affidavit signed by Mr. Diaz. Attached was a note purportedly from Mr. Diaz addressed to Ronald Guttman, Esq., CBS in-house counsel, stating "Ron, it looks good to me." Mr. Diaz testified that the draft affidavit refreshed his recollection that he had read the Diaz Affidavit. Mr. Diaz maintained that he had had problems with portions of the Diaz Affidavit and had told his attorneys of that fact. He testified, however, that he still disagreed with certain statements contained in the document.

Defendants' counsel opposed the sanctions on the grounds that they had prepared a final version of all the summary judgment affidavits in consulation with their clients. Meetings were held with Mr. Diaz and several revised drafts were prepared in order to

include the suggestions for changes made by Mr. Diaz. Exhibit A was based upon Mr. Diaz's descriptions of his movements in and around the Flexcraft plant.

I have closely read the portions of Mr. Diaz's testimony cited by plaintiff. Although the incident appeared unusual to me, the record indicates nothing more than that Mr. Diaz's memory of the affidavit and the process of its preparation had become vague with the passage of time. In addition, it appears to me that Mr. Diaz may have been unprepared for his testimony by not having his memory refreshed from the files and he was surprised when confronted by his affidavit. Plaintiffs' attempt to paint this situation as indicative of a deliberate attempt be defendants to mislead the Court and the jury is untenable. Accordingly, plaintiffs' motion for sanctions in connection with the Diaz Affidavit is denied.

CONCLUSION

CBS's motions for judgment notwithstanding the verdict and for a new trial are denied. Plaintiffs' motion for sanctions is granted in part and denied in part.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

79 Civ. 4373 (KTD)

IRVING MACHLEDER and
FLEXCRAFT INDUSTRIES, INC.,

Plaintiffs,

– against –

ARNOLD DIAZ, CBS INC., WCBS-TV, ANN SORKOWITZ and JOHN DOES 1 through 3,

Defendants.

MEMORANDUM & ORDER

KEVIN THOMAS DUFFY, District Judge:

In this diversity action alleging defamation, invasion of privacy, assault and battery, and trespass, defendants move for summary judgment. Plaintiffs cross-move for summary judgment on one of its defamation claims and on its trespass claim. In addition, both parties move for costs and attorneys' fees incurred in responding to each others motion.

This action results from the broadcast on WCBS-TV of an encounter on May 22, 1979 between defendant Arnold Diaz, then WCBS-TV's New Jersey investigative correspondent, and Irving Machleder, president of Flexcraft Industries, Inc. ("Flexcraft") on the property of Flexcraft in Newark, New Jersey. Flexcraft is a New Jersey corporation which manufactures industrial adhesives and coatings, chemical products and arts and crafts materials at its building in Newark.

Certain facts about the events of May 22 are undisputed. Acting on a tip received that day from an unidentified person, Diaz went to a lot in Newark, New Jersey adjacent to the Flexcraft building with a film crew to investigate reported dumping of chemical wastes. When he arrived at the lot, Diaz saw several large drums strewn about. The drums were marked with labels that said "hazardous" and "flammable." After walking around and examining the barrels, Diaz and the film crew approached the neighboring building with the belief that the abandoned chemical barrels were on Flexcraft property. Diaz was unaware at the time that the lot on which these drums lay was in fact owned by the Newark Housing Authority. Diaz walked to a side door of the building. An issue of fact exists as to whether Diaz actually entered the doorway. Diaz claims that he and his crew did not enter it but stood outside while the cameraman took a picture of an area 8 to 10 feet inside the building that was illuminated by the camera's lights. Immediately, Bruce Machleder, who is the son of the plaintiff Irving Machleder and who was working in the area near the doorway, asked Diaz and his crew to stop filming and to leave because several of the company's trade secrets were within plain view. Bruce alleges that

Diaz was actually inside the building at this time. Diaz then inquired: "can you tell me about the drums in the back," and Bruce replied that Diaz should go around to the office at the front of the building.

As Diaz and his crew walked to the front of the building, Diaz noticed a man walking away from the building who Diaz presumed to be a member of the Flexcraft management. Cameras rolling, Diaz approached the man, who turned out to be Irving Machleder, and asked him if he knew anything about the dumped chemical barrels. Machleder said that he did not want to be filmed for television and advised Diaz to call the "housing department." Diaz persisted and moved his microphone closer to Machleder in an attempt to elicit a response. Machleder became agitated and turned back to his office. Diaz and his crew followed him. Machleder claims, and defendants deny, that during this time one of the members of the camera crew jabbed him in the ribs. Once Machleder was back in his office with the door closed, Diaz came in. According to Diaz, he was invited in by Bruce Machleder who answered several questions posed by Diaz off-camera. Bruce explained to Diaz that Flexcraft had reported the abandoned chemical barrels to the authorities.

Diaz then returned to his car and called his researcher Ann Sorkowitz at the WCBS-TV offices in New York on his car's two-way radio. He asked her to call the Newark Housing Authority ("NHA"), the United States Coast Guard ("USCG") and the New Jersey Turnpike Authority ("NJTA") to confirm Bruce's assertion that Flexcraft had reported the dumping and to obtain any additional information about the barrels.

Diaz then went to the Newark City Hall to speak with officials at the Mayor's office and the Fire Department. He subsequently returned to the lot next to Flexcraft to find Newark Deputy Fire Chief Joseph McLaughlin inspecting the dumpsite. Diaz interviewed Deputy Chief McLaughlin on camera and then returned with his crew to the WCBS-TV news studio in Manhattan. There, Ms. Sorkowitz told Diaz that Flexcraft

had reported the chemical dumping to both USCG and NJTA. Apparently, NHA did not return Ms. Sorkowitz's call that afternoon.

Later that evening, the following news report was aired by WCBS-TV on its Six O'Clock News program:

> JIM JENSEN: Barrels of chemicals haphazardly strewn in an Elizabeth, New Jersey field depot — it is a nightmare which Arnold Diaz started telling you about five months ago. This evening Arnold has an exclusive report on yet another case of chemical waste discarded without care in New Jersey. Arnold . . . .
>
> ARNOLD DIAZ: Thanks, Jim. Yesterday I got a call from a viewer who asked to remain anonymous. "Diaz", he said, "while you're investigating the chemical dumping problem, go take a look in Newark on Avenue P." So I went there today, and here's the result.
>
> Just off the Turnpike, in an area full of oil refineries and chemical companies I found the spot — 527 Avenue P in Newark. I saw hundreds of drums of chemical waste that had been dumped there and left to rot. On the drums were labels, like "flammable", "hazardous." I went further back among the drums and found many that had rusted, the contents spilling onto the ground, and, even worse, spilling into a waterway that runs behind the land. The slimy green water reeked of the noxious odor of chemicals.
>
> Now, just who owns these barrels, what's inside of them and how they got there I really don't know. But I do know there is a small business on the property over there, and I went inside to try to get some answers. So I went to the office of Flexicraft [sic], a company that uses chemicals to make art supplies, and found the manager outside.

FLEXICRAFT [sic] MANAGER: "Get that damn camera out of here."

ARNOLD DIAZ: "Sir --- sir ---"

FLEXICRAFT [sic] MANAGER: "I don't want to be involved with you people . . . . ."

ARNOLD DIAZ: "Just tell me why -- why are those chemicals dumped in the back . . . ."

FLEXICRAFT [sic] MANAGER: "I don't want --- I don't need -- I don't need any publicity . . . ."

ARNOLD DIAZ: "Why are the chemicals dumped in the back?"

FLEXICRAFT [sic] MANAGER: "We don't -- we didn't dump 'em."

ARNOLD DIAZ: "Who did?"

FLEXICRAFT [sic] MANAGER: "You call the Housing Department. They have all the information."

ARNOLD DIAZ: The manager told me off camera that for years the city has known all about the problem of chemical dumping on the land. So I went to City Hall, where the Mayor's Assistant said the Fire Department would check out the problem immediately. And when I got back to the scene, there they were, trying to find out what's in the barrel.

DEPUTY CHIEF J. McLAUGHLIN, NEWARK FIRE DEPARTMENT: "Well, it looks like the residue of a manufacturing plant that put out a lacquer or a paint base of some kind."

ARNOLD DIAZ: "And is it a threat to safety?"

DEPUTY CHIEF J. McLAUGHLIN: "I'm fairly sure there's a hazard there. Whatever material hasn't been dried out, and there'd be enough solvent in there to create a hazard if the drum was heated to the right point."

ARNOLD DIAZ: "It could explode?"

DEPUTY CHIEF J. McLAUGHLIN: "The drum would explode, and somebody could be sprayed."

ARNOLD DIAZ: Late this afternoon I was able to confirm that the owner of Flexicraft had told State and Local authorities about the illegal dumping two years ago, and nothing' been done [sic]. The City of Newark says the State should clean it up. The State says they're investigating, but it's not necessarily their responsibility, because the Newark Housing Authority owns the lands. So the drums still sit there – still leaking. Jim . . . .

(Diaz Affidavit, Exh. B)

This report was not aired on the television station's Eleven O'Clock News program.

What the dry transcript of the report does not show is the reaction of Irving Machleder when Diaz and the film crew approached him. A video tape of the aired report and of the unedited film of Diaz's interviews were provided to the court. The film clearly shows an agitated Irving Machleder.

The complaint alleges (1) that Sorkowitz slandered Flexcraft when she called the various authorities, and that Diaz and CBS libeled plaintiffs on the May 22, 1979 news program; (2) that Diaz's activities constitute an invasion of privacy; (3) that members of the camera crew are liable for assault and battery because they jabbed plaintiff Machleder in the ribs; and (4) that Diaz and the camera crew trespassed on plaintiffs' property.

Defendant has moved for summary judgment on all of plaintiffs' claims. Plaintiffs have cross-moved for summary judgment on the slander claim involving Ms. Sorkowitz and the trespass claim. For the following reasons, plaintiffs' motions are denied, and defendants' motions are granted in part only.

1. *Choice of Law*

Resolution of the motions before me requires a determination of whether New York or New Jersey law applies to plaintiffs' claims. The parties agree that the claims for assault and battery and trespass are governed by the law of New Jersey. A question exists, however, over which law applies to the libel, slander and invasion of privacy claims. Because this diversity action was brought in New York, New York's conflict of law rules will be applied to resolve this issue. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Mattox v. News Syndicate Co., Inc.*, 176 F.2d 897 (2d Cir.) (L. Hand), *cert. denied*, 338 U.S. 858, 70 S.Ct. 100, 94 L.Ed. 525 (1949).

Under New York law, courts apply the substantive tort law of the state which has the "most significant relationship with the occurrence and with the parties." *Babcock v. Jackson*, 12 N.Y.2d 473, 484, 240 N.Y.S.2d 743, 752, 191 N.E.2d 279, 288 (1963); *Mattox v. News Syndicate Co., supra*, 176 F.2d at 900. Here, the allegedly libelous news report depicted an encounter which took place in New Jersey. The report was part of a series prepared by defendant CBS' New Jersey reporter, Arnold Diaz, and was aired throughout Northern New Jersey and the tri-state New York City metropolitan area. Defendant Ann Sorkowitz's allegedly defamatory statements were made to New Jersey public officials. In addition, plaintiff Irving Machleder is a citizen and resident of New Jersey and plaintiff Flexcraft is a New Jersey corporation with its principal place of business in New Jersey. Plaintiffs claim that as a result of defendants' allegedly defamatory statements, plaintiffs suffered damages to their business in New Jersey.

In spite of these significant contacts with the New Jersey forum, defendants claim that New York's law should apply because New York is the defendants' principal place of business as well as the place where the news report was conceived, edited and broadcast. Defendants claim that New York has a stronger interest than New Jersey in "protecting and fostering a vigorous news media" (Defendants' Brief p.15) and thus urge that New York law should apply.

The Supreme Court's decisions in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997. 41 L.Ed. 2d 789 (1974), placed new emphasis on the importance of considering First Amendment rights of media defendants in defamation cases. However, in *Gertz*, the Court also reaffirmed a state's interest in protecting its private citizens from defamatory falsehoods. *Gertz, supra*, 418 U.S. at 341, 94 S.Ct. at 3008. *Gertz* permits states to establish their own standards of fault, short of strict liability, necessary to find a media defendant liable for defamatory statements about a private person. Therefore, despite the interest of New York in establishing a standard of fault for its news media, New Jersey also has an important competing interest in protecting its citizens from defamation. Coupled with New Jersey's additional interest in governing the fault of those who come within its boundaries to investigate the news and later broadcast it there, these factors call for the application of New Jersey law.

For these same reasons, New Jersey bears the "most significant relationship" to plaintiffs' claims of invasion of privacy, and accordingly its law will apply to these claims as well. *See Nader v. General Motors Corporation*, 25 N.Y.2d 560, 565, 307 N.Y.S.2d 647, 651, 255 N.E.2d 765, 769 (1970).

2. *Defamation*

a. The News Broadcast

Plaintiffs' first count alleges that the defendants' broadcast on May 22, 1979 contained a report which was defamatory. Plaintiffs claim that the report depicted plaintiffs as being responsible for the chemical dumping. It did this by making outright false statements, such as identifying the dump site as "527 Avenue P" -- the address of Flexcraft -- and by presenting the report in such a way that the language and composition of the television broadcast taken as a whole inferred that plaintiffs dumped the chemical barrels.

New Jersey generally adopts the definition of defamation found in the Restatement (Second), Torts, Section 559 (1977) which states:

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him.

See Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761 (D.N.J. 1981); *see also Rogozinski v. Airstream By Angell*, 152 N.J. Super. 133, 377 A.2d 807 (Super. Ct. Law Div. 1977), *aff'd*, 164 N.J. Super. 465, 397 A.2d 334 (Super. Ct. App. Div. 1979).

Whether or not the broadcast "can reasonably be construed as defamatory is a question for the Court in the first instance." *Cibenko v. Worth Publishers, Inc., supra*, 510 F. Supp. at 764 *citing* Restatement 2d, Torts, Section 614, Comment b (1977); *Lawrence v. Bauer Publishing & Printing Ltd.*, 176 N.J. Super. 378, 392, 423 A.2d 655, 662 (Super. Ct. App. Div. 1980). The standard followed in *Cibenko* is whether, taking the broadcast as a whole, a recipient "correctly, or mistakenly but reasonably, understands" the statement in a light which would make it defamatory with respect to the plaintiff.

Can the report reasonably be interpreted to portray falsely the plaintiffs as illegal chemical dumpers? Three parts of the report, (i) the implication that the dumping occurred on the plaintiff's land, (ii) the portrayal of plaintiff Machleder's anger as a defensive and guilty response to Diaz's questions about the dumping rather than an angry response to being confronted with television cameras, and (iii) the fire chief's statement that the contents of the barrels consisted of by-products of paint and lacquer (items manufactured by the plaintiffs), placed in juxtaposition to each other, could, according to plaintiffs, reasonably lead a viewer to believe that plaintiffs were responsible for the dumping. However, the report also stated and confirmed that plaintiffs had reported the dumping to the proper authorities years earlier. In addition, Diaz corrected himself about the address of the dumpsite by saying that the barrels were strewn on property owned by the Newark Housing Authority. Nevertheless, after viewing the videotape of the report as a whole,

I believe that it could lead a reasonable person to conclude that plaintiffs dumped the chemicals. This conclusion is buttressed by the affidavit of a viewer of the Diaz news report, James Kulpa, who states that "[f]rom the broadcast of May 22, 1979 it appeared to me that Mr. Machleder and Flexcraft were involved in dumping chemical wastes into a waterway on the Flexcraft property and that they were in some way involved with Chemical Control." (Kulpa Affidavit ¶2) Although Mr. Kulpa is a longstanding friend of Mr. Machleder his statement cannot be dismissed out-of-hand but must await deliberation by the trier of fact.

The next question to be resolved is whether the defendants acted with the requisite degree of fault in their news broadcast about the plaintiffs. Again, it appears that New Jersey follows the Restatement on this point. *See Rogozinski, supra*, 152 N.J. Super. at 145-46, 377 A.2d at 813. The Restatement, Torts 2d Section 580 B (1977) provides:

> One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he
>
> > (a) knows that the statement is false and that it defames the other,
> > (b) acts in reckless disregard of these matters, or
> > (c) acts negligently in failing to ascertain them.

Comment C to this section, "Effect of the Constitution," provides:

> In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 [94 S.Ct. 2997, 41 L.Ed.2d 789] (1974), the Supreme Court specifically held that the First Amendment to the Constitution does not permit the imposition of "liability without fault" on "a

> publisher or broadcaster of defamatory falsehood injurious to a private individual". Aside from this restriction, the Court said, the States may define for themselves "the appropriate standard of liability". The strict liability of the common law has thus been expressly ruled unconstitutional. A significant measure of fault on the part of the defendant in regard to the falsity of the communication is required. Obviously, knowledge of falsity or reckless disregard as to it is sufficient. It is clear that negligence will likewise meet the constitutional requirement, although a lesser degree of fault probably would not. In view of the constrained change from the common law strict liability, it is natural to conclude that the revised common law rule of defamation will be that a defendant is liable either for negligence or for some greater fault.

In New Jersey, the degree of "fault" required after *Gertz* has been tied to the common-law qualified privileges. *See Rogozinski, supra*, 152 N.J. Super. at 145-46, 377 A.2d at 819. In *Rogozinski*, the court found that where a qualified privilege exists, a showing of *express malice* is a prerequisite to imposing liability for defamation. There is no common-law qualified privilege, however, for the news media in publishing defamatory statements about private citizens. Therefore, it is not clear whether New Jersey would adopt the *Rogozinski* standard under the circumstances of this case.

Following the letter of the Restatement, which has been the consistent approach of New Jersey courts, liability may be imposed at the very least on a defendant who "knows that the statement is false and that it defames the other . . . ." Restatement Torts, 2d Section 500B(a). *See also, id.* Section 600. Evidence must exist to permit the conclusion that the defendants entertained serious doubts as to the truth of the publication. *See Marchiano v. Sandman*, 178 N.J. Super. 171, 428 A.2d 541 (Super. Ct. App. Div. 1981). This standard is considerably higher than

the post-*Gertz* standard of fault found in many jurisdictions, including New York.[1] Even under this stricter standard, however, the record before me indicates substantial questions of fact concerning defendants' knowledge that their presentation was false.

The Diaz report, without question, involved a subject of public interest. Prior to the May 22 broadcast, local chemical dumping was an obvious problem of great magnitude in New Jersey. Earlier that same year defendants broadcast four reports on various chemical waste problems in New Jersey which posed imminent health hazards to its citizens. Cohen Affidavit Exhs. A, B, C, D. Also, the print media reported extensively on the chemical waste problem in New Jersey. *See* Keene Affidavit. When reporting on such areas of public concern, the news media are to be afforded great leeway. The Supreme Court in *Gertz*, however, expressly acknowledged the competing interests of states "in compensating injury to the reputation of private individuals . . . ." 418 U.S. at 343, 94 S.Ct. at 3009. Mr. Machleder is a private individual. Perhaps the clearest evidence of this is the fact that Diaz had no idea who Mr. Machleder was before he approached him with questions. Accordingly, Mr. Machleder is entitled to be compensated for injury to his reputation provided the defendants have acted with the requisite degree of culpability.[2]

The undisputed facts in the case show that defendants conducted an investigation over several hours to gather information on which to base their short program. Prior to broadcasting it, the defendants examined the dump site, interviewed (or at least attempted to interview) the Flexcraft managers and talked to several local, state and federal officials about the abandoned barrels. Despite this background, the defendants presented their broadcast in what could be described as a defamatory matter; i.e., implying that Flexcraft was responsible for the dumping. Evidence in the record exists to show that this implication may not have been far from defendants' minds when they edited the program for presentation. Stephen J. Cohen, the News Director of WCBS-TV, described in part the decision to show Machleder's agitated response to Diaz' questions in the program as follows:

> I have come to believe that a bare denial of complicity in a situation like this by someone close enough to it geographically or situationally to logically have had the opportunity to have information about it, is simply not a sufficient response to reporter's questions.
>
> (Cohen Affidavit ¶19)

Thus, Cohen may have shown Machleder's angry response in order to create the very impression which plaintiffs argue is defamatory, to wit, that because the president of the company whose land is situated next to a chemical dump site does not wish to answer the reporter's questions and becomes agitated when asked these apparently accusatory questions, he must be in some way responsible for the presence of the chemical wastes. The video tape of the news program could be interpreted to show Machleder as evasive, quilty, and the anonymous dumping culprit. The fact that the defendants excised from their broadcast statements by Chief McLaughlin that the situation presented no hazard and that the dumping did not originate locally indicate that the defendants may have deliberately created this false impression of the plaintiff Machleder. It is true that defendants aired Machleder's disclaimer and a statement by Diaz that he did not know who dumped the chemicals. Diaz also stated on the program that the property was owned by the Newark Housing Authority, not Flexcraft. Despite these facts, a jury might reasonably find that defendants intentionally presented the false impression that Machleder was responsible for the dumping.[3]

I am cognizant of the general acceptance of summary judgment in defamation cases in the interests of protecting first amendment rights of media defendants. *See Guitar v. Westinghouse Electric Corp.*, 396 F. Supp. 1042 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 309 (2d Cir. 1976); *Meeropol v. Nizer*, 381 F. Supp. 29, 32 (S.D.N.Y. 1974), *aff'd*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed. 2d 756 (1978); *see also, Washington Post v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011, 87 S.Ct. 708,

17 L.Ed. 2d 548 (1967). None of these cases suggest, however, that where genuine issues of fact are present, especially as to the degree of defendants' fault, summary judgment is appropriate. *See Yiamouyiannis v. Consumers Union of United States*, 619 F.2d 932, 940 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980) ("Defamation actions are to be treated no differently from other actions."); *see also, Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406 (E.D. Pa. 1978). Accordingly, defendants' motion for summary judgment on the libel claim is denied.

b. Sorkowitz's Statements

Plaintiffs also claim that defendant Ann Sorkowitz, Diaz's assistant, made defamatory statements to New Jersey public officials accusing plaintiffs of involvement in the illegal dumping. The affidavits of two government officials state that Sorkowitz asked something to the effect that "were you aware that Flexcraft was dumping chemical wastes in New Jersey." (Ruezel and Olarsch Affidavits). Defendants do not seriously dispute the assertion that such statements were made. Instead, defendants seek to dismiss this claim on the grounds that Sorkowitz's communications were made in the public interest on an "occasion when it was [her] duty to speak . . . in protection of some common interest," and thus were conditionally privileged. *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, 374, 149 A.2d 193, 202 (1959); *Cashen v. Spann*, 125 N.J. Super 386, 406, 311 A.2d 192, 203 (Super. Ct. App. Div.), *aff'd*, 66 N.J. 541, 334 A.2d 8 (1973), *cert. denied*, 423 U.S. 829, 96 S.Ct. 48, 46 L.Ed. 2d 46 (1975).

Ms. Sorkowitz is entitled to invoke this conditional privilege only if she used the occasion (of calling the public officials) to protect "some common interest." *Coleman v. Newark Morning Ledger Co., supra*, 29 N.J. at 374, 149 A.2d at 202. However, any conditional privilege she is entitled to is destroyed in the presence of express malice or bad faith. *Jorgensen v. Penn R.R. Co*, 25 N.J. 541, 566, 138 A.2d 24, 38-39 (1958). If Ann Sorkowitz had full knowledge of the untruthfulness of her statements at the time she allegedly made them, then any rights

to the privilege are forfeited. *See Coleman v. Newark Morning Ledger, supra*, 29 N.J. at 374-75; 149 A.2d at 203; *Dijkstra v. Westerink*, 168 N.J. Super. 128, 135, 401 A.2d 1118, 1121 (Super. Ct. App. Div. 1979). If she had a mixed motive, including one "different from that which *prima facie* rendered the communication privileged," she can also forfeit any privilege if that different motive is found to be "contrary to good morals." *Jorgensen v. Penn R.R. Co., supra*, 25 N.J. at 568, 138 A.2d at 39-40.

The burden of proving a forfeiture of privilege is on the plaintiff. *Cashen v. Spann, supra*, 125 N.J. Super. at 406, 311 A.2d at 203, and plaintiffs' evidence has to be unequivocal in order to defeat a summary judgment motion. *Id.* at 406, 311 A.2d at 203.

Ms. Sorkowitz's deposition testimony indicates that she intended to make inquiries as to whether Flexcraft had informed government agencies of the dumping. She also stated that she had no reason to believe Flexcraft was responsible for the dumping. Thus, the defamatory statements she allegedly made seem to bear no relation to the purpose of her call and may be unprivileged. Material issues of fact exist as to whether Ms. Sorkowitz also intended to alert officials of the dumping in the public interest; whether this entitles her to a conditional privilege; whether she in fact made slanderous statements, and whether she had made those statements recklessly or with malice. Thus, summary judgment on this claim is denied.

3. *Invasion of Privacy*

In the second count of their complaint, plaintiffs claim that defendants invaded Mr. Machleder's right of privacy. New Jersey permits the common law privacy actions recognized in the Restatement (Second) of Torts, Section 652. *Devlin v. Greiner*, 147 N.J. Super. 446, 462, 371 A.2d 380, 389 (Super. Ct. Law Div. 1977). Three or the four types of common law privacy actions are at issue here. Plaintiffs claim that defendants (1) intruded upon plaintiff Machleder's seclusion, (2)

publicized Machleder's private life, and (3) publicized him in a false light by inducing his anger and then portraying him as intemperate and evasive, thereby implying he was responsible for the chemical dumping.

The two major elements of intrusion upon seclusion, as described in the Restatement (Second) of Torts, Section 652B, are (1) something private which has been intruded upon, and (2) an intrusion which is "highly offensive."* Machleder was accosted and filmed in a semi-public area, and he was visible to the public eye. Diaz's questioning, although aggressive and possibly abrasive, occurred in one encounter with plaintiff and does not constitute unabated hounding of the plaintiff. Thus, defendant is not liable for intruding upon plaintiff's seclusion. Restatement (Second) of Torts, Section 652B, Comment c and d.

Similarly, plaintiffs' claim for improper publicity given to his private life must be dismissed. Defendants' purported reason for broadcasting the film of Machleder's angry reaction was that such a reaction to questions about dumping is of public concern. In fact, it appears Machleder's anger may have had more to do with the presence of the cameras than the substance of the reporter's questions. Although the portrayal of Machleder's angry reaction is of doubtful concern to the public, and arguably intrusive, the encounter took place in a semi-public area while plaintiff knew the cameras were rolling. Defendant is subject to no liability for giving further publicity to that which plaintiff leaves open to the public eye. Restatement (Second) of Torts, Section 652D, Comment b.

Plaintiffs' claim for false light invasion to his privacy merits different consideration. Under New Jersey law, false light invasion of privacy is a cause of action separate from a defamation claim. *Devlin v. Greiner, supra*, 147 N.J. Super at 463, 371 A.2d at 390; *Cibenko v. Worth Publishers, supra*, 510 F. Supp. at 766. The two requirements of false light invasion of privacy are (1) a highly offensive publication, and (2) knowledge or reckless disregard by the actor as to the falsity of the publicized matter and the false light in which the subject would be placed. It is not necessary that the publication be found to be

defamatory in order to have invaded plaintiffs' privacy under this claim. *Cibenko, supra*, 510 F. Supp. at 766.

Defendants' alleged portrayal of Machleder as intemperate and evasive in response to Diaz's questions cannot be deemed inoffensive as a matter of law. Machleder asserts that his reactions were not evasive but resulted from Diaz's provocative manner of asking questions and from the presence of the cameras. If plaintiffs' contentions are found to be true, and defendants' portrayal of Machleder is found to be a knowingly false depiction of him as intemperate and even guilty of dumping, then defendants may be liable for false light invasion of privacy. The record before me certainly does not rule out these possible findings, and accordingly summary judgment for this claim is denied.

4. *Assault*

Plaintiffs allege that during the encounter with Machleder one of the CBS cameramen struck Machleder forcibly. Under New Jersey law "violence and force are synonomous when used in relation to assault and includes any application of force even though it entails no pain or bodily harm and leaves no mark." *Falconiero v. Maryland Cas. Co.*, 59 N.J. Super. 105, 106, 157 A.2d 160, 162 (Camden County Ct. 1960). Thus, if it is found that the cameraman touched Machleder in an offensive way to move him into the picture, as has been alleged, he has committed a technical assault even though Machleder suffered no bodily harm. *See Rullis v. Jacobi*, 79 N.J. Super. 525, 192 A.2d 186, (Super. Ct. Ch. Div. 1963). Defendants allege that any alleged touching was inadvertant. This raises a material issue of fact, and summary judgment on this count is therefore denied.

5. *Trespass*

Count IV of the complaint alleges that defendants wrongfully trespassed upon Flexcraft's property. License to enter someone's property may be implied from a general understanding or practice. *See McKee v. Gratz*, 260 U.S. 127, 43 S.Ct. 16, 67 L.Ed.

167 (1922). Defendants' entrance onto plaintiffs' property was not forcible and there were no signs warning visitors to keep off the property. It is uncontroverted that Bruce Machleder met the defendants and instructed them to proceed to the building's office. Although Bruce purportedly told Diaz to leave the doorway to the side door of the Flexcraft building, at no time did Bruce tell the defendants to leave the entire premises. His actions implied his consent to the defendants' remaining on the lot. In front of the office, defendants encountered Irving Machleder. Although Machleder expressed anger at being filmed, he did not tell defendants to leave the property. To the contrary, at the close of the encounter, defendants were still able to obtain an interview with Bruce Machleder on Flexcraft property. This constitutes implied permission to remain on the property. This implied consent to be on plaintiffs' property precludes liability for trespass. *See Snyder v. I. Jay Realty Co.*, 30 N.J. 303, 153 A.2d 1 (1959). Summary judgment dismissing this claim is granted.[5]

Both plaintiffs and defendants have asked for attorneys' fees and costs for this motion. Since neither sides' arguments are totally baseless, both requests are denied. *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980).

Defendants' motion for summary judgment for Counts I, II and III is denied. Summary judgment on Count IV in favor of defendants is granted.

Plaintiffs' cross-motion for summary judgment for Counts I and II is denied.

SO ORDERED.

FOOTNOTES

1. The parties have not offered, and this court has been unable to locate, any New Jersey case which specifically addresses the degree of 'fault' required in a case involving a private plaintiff and a media defendant. In Maryland (whose state law a New Jersey court looked to in determining a post-*Gertz* standard where a qualified privilege existed. *Rogozinski, supra.*), a negligence standard is used. *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976). Several other states have adopted an actual malice standard. *See* Sack, Libel Slander and Related Problems 250 (1980) and cases cited therein. Under New York law, "where the context of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover. [if] . . . the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64, 341 N.E.2d 569, 571 (1975). This New York standard appears to require a level of culpability somewhere between malice and negligence.

2. The corporate plaintiff may have to be considered on a different footing. Because it is regulated under state law it may be considered public; also, if the company's equity is traded publicly this too may affect Flexcraft's "private" status. As a public figure it would be subject to the *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) standard of "actual malice." As will be discussed, *infra*, New Jersey appears to apply the same standard for both "private" and "public" persons.

3. Defendants have not argued in any way that this defamatory meaning was an expression of an opinion by the defendant and therefore protected under the First Amendment. I believe that the investigative context in which the report was presented precludes a reasonable

person from believing that it was anything other than a presentation of "facts". It was not a commentary on undisputed facts. *Compare Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761, 765 (D.N.J. 1981).

4. This part of plaintiffs' claim, unlike the other two for invasion of privacy, does not depend upon publicity. Restatement (Second) of Torts, Section 652B, Comment a. Thus, the intrusion under consideration is not the publicizing of plaintiff's reaction to defendant's confrontation but rather the defendant's act of confrontation itself.

5. Plaintiffs also claim that valuable trade secrets were wrongfully photographed. Since both Irving and Bruce Machleder agree that any secrets allegedly filmed could not be clearly read when viewed on an ordinary TV screen and plaintiffs do not claim that Arnold Diaz or CBS were interested in appropriating any trade secrets, this claim is dismissed as baseless.